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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

NEWELL RECYCLING COMPANY, INC.,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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139pp

QUESTIONS PRESENTED

1. Where the United States Environmental Protection Agency ("EPA") initiates a quasi-criminal administrative proceeding in which it awards itself, in summary judgment, a $1.345 million fine, which is 70.78 times greater than the EPA average fine (with no explanation for the disparity), with no formal hearing or oral argument permitted, where all agency proceedings are conducted by mail, and where discovery is denied and no rules of evidence enforced, are the EPA findings of fact entitled to any deference on appeal?

2. Did the Fifth Circuit Court of Appeals repudiate this Court's decision in United States v. Bajakajian, 524 U.S. 321 (1998) and chart a new course for the Eighth Amendment to the United States Constitution by its ruling that:

> "No matter how excessive (in lay terms) an administrative fine may appear, if the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment."

3. Where the EPA was notified in 1985 about the creation of a contaminated soil pile at a scrap yard in Houston and yet waited until 1995 to file its civil penalty action regarding the still existing soil pile, may the agency, without clear due process notice being given beforehand, undermine the five year statute of limitations under 28 U.S.C. § 2462 and evade the $25,000 penalty limit, by claiming there is

a "continuing disposal," even though there is no allegation of either continuing conduct or continuing harm?

4. While "strict" rules of evidence do not generally apply to federal agency adjudicatory proceedings pursuant to 5 U.S.C.§ 664 (Administrative Procedures Act), may an agency ignore public policy considerations and use subsequent remedial measures as legal admissions of liability; specifically, is the EPA permitted to argue that Petitioner is guilty of the 1985 illegal disposal, in-part, because it paid for the cleanup of the disposed material in 1995?

PARTIES TO THE PROCEEDINGS

Petitioner

Newell Recycling Co., Inc. It has no parent company and no subsidiaries. It does have an affiliated company called Alaska Metal Processors, Inc. [1]

Respondent

United States Environmental Protection Agency.

Other Parties

The EPA did sue Oklahoma Metal Processing, Inc. d/b/a Houston Metal Processing, but it settled. Matthew J. Nasuti did move for leave before the Fifth Circuit Court of Appeals to file an amicus brief, which was denied.

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[1] Petitioner was represented by Oppenheimer, Blend, Harrison & Tate, Inc. before the Fifth Circuit Court of Appeals, and by that firm, Langley & Banack, and the Law Office of Matthew J. Nasuti in the Petition for En Banc Review to the Fifth Circuit Court of Appeals.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

There are six prior opinions in this matter:

1. The January 9, 2001 denial for en banc review by the Fifth Circuit, which is reproduced at Appendix ("App.") C and reported at 2001 App.Lexis 834.

2. The November 9, 2000 denial of Petitioner's appeal by the Fifth Circuit which is reported at 231 F.3d 204 (5th Cir. 2000), and which is reproduced at App. A.

3. The September 13, 1999 opinion of the U.S. Environmental Protection Agency's Environmental Appeals Board, which is reproduced at App. B.

4. The July 23, 1997 penalty opinion of the EPA Presiding Officer.

5. The April 29, 1997 accelerated decision of the EPA Presiding Officer.

6. The February 6, 1997 decision of the EPA Presiding Officer denying Petitioner's discovery request.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was issued on November 8, 2000 and reported at 231 F.3d 204 (5th Cir. 2000). A timely petition for *en banc* consideration was denied by that court on January 9, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(l).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Question 2

Amendment VIII to the United States Constitution

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Question 3

15 U.S.C. § 2615

> "(a) Civil
>
> (1) Any person who violates a provision of section 2614 or 2689 of this title shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day such a violation continues shall, for purposes of this subsection, constitute a separate violation of section 2614 or 2689 of this title."

15 U.S.C. § 2615(2)

> "(B) In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history or prior such violations, the degree of culpability, and such other matters as justice may require."

28 U.S.C. § 2462

> "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon."

Question 4

5 U.S.C.§ 664

> "(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited

by a party and supported by and in accordance with reliable, probative and substantial evidence . . ."

STATEMENT OF THE CASE

In 1985, Newell Industries, Inc. ("Industries") and Newell Enterprises, Inc. ("Enterprises") returned to a scrap yard located at 5225 Fidelity Road, Houston, Texas ("Site") to excavate and dispose of some residual lead from a former battery breaking business that had operated there years earlier. The excavation was conducted under the supervision of the State of Texas. App. H at 108a-109a. The owner/operator of the Site was Oklahoma Metal Processors, Inc. d/b/a/ Houston Metal Processing ("OMP"). During excavation activities by Industries and Enterprises, several transformers containing polychlorinated biphynols ("PCBs") were uncovered. App. G at 106a. They were removed and the surrounding soil pushed into a 20 cubic-yard pile. Work was halted while the parties consulted the Texas Department of Health, which in turn consulted with the U.S. Environmental Protection Agency-Region 6 ("Region 6"). App. G at 107a. The matter continued to be studied and Region 6 was again briefed in 1987. At that time the agency took the position that the matter was too minor for them to get involved. App. F at 103a. Region 6 was briefed again in 1989. App. E at 101a-102a. The pile, now overgrown with vegetation [See photos at Appellate Record ("A.R.") pp.188-193], sat undisturbed in the back area of the scrap yard until 1995 when it was disposed of by OMP for $84,000. Those monies were reimbursed to OMP by Newell Recycling Co. Inc. ("Petitioner") under a "no-admissions" agreement to help settle a lawsuit regarding OMP's purchase of the scrap yard from Petitioner in 1982. *Oklahoma Metal Processing Co. v.*

Newell Recycling Co., Inc., et al., Civil Action No. H-95-4596 (S.D.Texas) Houston Div.

On March 30, 1995, Region 6 filed an administrative complaint internally with the EPA against Petitioner and OMP, seeking a $1.345 million civil penalty under the Toxic Substances Control Act (15 U.S.C. § 2614 *et seq.*) for the illegal disposal of PCBs in that 20 cubic-yard soil pile. A.R.1 The agency's evidence was three grab samples which found PCBs at 190 parts per million ("ppm"), 190 ppm and 230 ppm, with the action level being 50 ppm. A.R. 195-205. OMP settled the Complaint with Region 6 for $90,000, while Petitioner rejected Region 6's $90,000 settlement offer and elected to litigate.

Petitioner moved for an order permitting service of a combined set of document requests and interrogatories on Region 6, (A.R.522-559) which Region 6 promptly moved to have quashed. Region 6 in its brief urged Petitioner to instead file a Freedom of Information Act ("FOIA") request with the EPA under which it could obtain all the documents it was seeking. App. D at 93a to 96a. Region 6 argued that "formal" discovery was completely unnecessary. The Presiding Judge agreed with Region 6 and denied discovery. Petitioner, in reliance on Region 6's representations, then filed a FOIA request for the documents it needed and Region 6 proceeded to **deny** almost all of the request! App. D at 97a to 99a. [2]

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[2] It is governmental arrogance such as this which caused the English barons to unite against King John, forcing him to sign of the Magna Carta in 1215. Petitioner finds itself petitioning this Court for a similar charter of liberties against abuses by the EPA.

Region 6 then moved for an accelerated decision (summary judgment), which Petitioner opposed by presenting evidence (including App. H at 105a to 106a) which established numerous factual disputes, including that it was Enterprises and not Petitioner which created the soil pile in 1985. Despite these factual disputes, the Presiding Officer granted Region 6's motion without holding a formal hearing. He found that:

A. The illegal PCB disposal (soil pile) in 1985 was a continuing disposal, even thought there was no claim by EPA of release from the pile and no allegation of environmental harm;

B. Petitioner was held to be liable based on several factors including actions taken by Petitioner after the creation of the soil pile. The agency held that subsequently hiring consultants to investigate the soil pile and ultimately reimbursing OMP for its costs to dispose of the soil pile in 1995, were admissions that could be used to impose liability on Petitioner.

Petitioner then requested a formal hearing before imposition of the penalty. 40 C.F.R. § 22.15c reads, in relevant part that: "A hearing shall be held upon the request of the respondent." The request was denied on the grounds that essentially "shall" does not mean "must." App.B at 60a Petitioner introduced, without objection, agency precedent that showed that the EPA, in the past, had imposed an average penalty of $19,000 for similar TSCA PCB disposal violations. A.R.1113-1114. The EPA Presiding Officer held that the

agency does not have to consider agency precedent and proceeded to grant EPA's request for the full $1.345 million penalty. Petitioner filed an internal appeal to the EPA Environmental Appeals Board ("EAB") and requested permission to make oral argument. The EAB denied the request for oral argument and affirmed the Presiding Officer's summary judgment decision. The EAB held that is was more likely than not that the soil pile was created by Petitioner. [3] The EAB went on to cite *Butz v. Glover Livestock Commission. Co.*, 411 U.S. 182, 187 (1973) as authority for the proposition that the EPA did not have to consider prior agency fines when imposing a new fine. App. B at 88a. The entire EPA proceedings were conducted by mail. A timely appeal was then filed with the Fifth Circuit Court of Appeals, which issued its ruling on November 8, 2000:

(1) affirming that the illegal disposal (i.e. creation of the soil pile) was a continuing disposal;

(2) affirming that the EPA could use subsequent remedial measures as admissions of liability; and

(3) rejecting Petitioner's request for a de novo review of the allegedly excessive fine on the grounds that "excessive" does not mean excessive as a layperson would interpret it. The Fifth Circuit

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[3] The EAB weighed the facts and decided that it was more likely than not that Petitioner was liable (App. B at 57a), which was improper as this was a summary judgment appeal where the underlying facts were clearly in dispute.

Court of Appeals ruled that while the EPA fine was "severe" as there was no evidence of environmental harm, it was without authority to review the fine because it was less than the maximum that is technically set forth under the TSCA statute. The court also affirming the EPA position that under *Butz,* prior agency TSCA precedent is irrelevant; App. B at 14a.

Petitioner filed a timely motion for rehearing in banc, which was denied on January 9, 2001, App. C at 91a-92a.

REASONS FOR GRANTING THE PETITION

I. THE STANDARD OF REVIEW OF AGENCY SUMMARY JUDGMENT DECISIONS IS A MATTER OF FIRST IMPRESSION AND MERITS SCRUTINY BY THIS COURT

The EPA, through 40 C.F.R. § 22.20(a) has promulgated a regulation that permits the agency to conduct summary proceedings, which it calls "accelerated decisions." This rule was generally reviewed in *Puerto Rico Aqueduct & Sewer Authority v. EPA*, 35 F.3d 600, 607 (1st Cir.1994). The First Circuit held that ". . . the concept of administrative summary judgment has been linked inextricably to Fed.R.Civ.P. 56." What the First Circuit did not specifically discuss is whether the standard for appellate review of this newly created summary proceeding is or should be the same as under Rule 56 (i.e. de-novo review). As Congress, in 5 U.S.C. § 706, did not set out de-novo review as an explicit standard, it is arguable that Congress either did not intend for federal agencies to act summarily or the Congress left it to the

courts to set the standard of appellate review from such summary proceedings or Congress intended to create a standard of judicial review for agency summary judgment that was different from summary judgment imposed by a District Court. Petitioner has found no authority that squarely addresses this issue, although it is unlikely that Congress intended to depart from the Rule 56 standard of de-novo appellate review.

There are several decisions which do address what deference, if any, is owed to agency decisions. In *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 569 (1990) the court held that no deference is owed to either an agency or the Congress on constitutional matters. In *Western States Petroleum Association v. E.P.A.*, 87 F.3d 280, 283 (9th Cir.1996) the court held that if EPA failed to follow its own standards (as in the case at bar) no deference is owed to the agency's decision. Finally in *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1507, n.24 (11th Cir.1996), the court, in dicta, went even further. It stated that where the EPA is functioning as a prosecutor, agency findings are not entitled to any deference at all by the courts.

In conclusion, when the EPA initiates a quasi-criminal administrative proceeding[4] in which it makes a monetary award to itself in summary judgment, the EPA findings of fact should not be entitled to any deference when the case is appealed to a Federal Court of Appeals. A ruling of this type

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[4] Caselaw supporting the proposition that civil penalty cases are quasi-criminal includes: *United States v. Hoeshst Celanese Corporation*, 128 F.3d 216, 224 (4th Cir.1997); and *United States v. Am General Corp.*, 34 F.3d 472, 474 (7th Cir. 1994).

would clarify and standardize federal law regarding the appellate review of summary proceedings, and such a ruling is needed on this important question.

II. THE FIFTH CIRCUIT'S RULING ON EXCESSIVE FINES UNDERMINES AND CONFLICTS WITH THIS COURT'S HOLDING IN U.S. v. BAJAKAJIAN

The Fifth Circuit held that the fine in the case at bar was "severe" since there was no actual harm, but the court then stated that:

> "No matter how excessive (in lay terms) an administrative fine may appear, if the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment." App. A at 14a

In *United States v. Bajakajian,* 524 U.S. 321 (1998) the Court issued a two-part ruling regarding penalties which might violate the Excessive Fines Clause. The Fifth Circuit Court of Appeals, in the case at bar, has rejected both parts of the ruling.

First, the Supreme Court recited that "excessive" has no magical meaning, that excessive means "surpassing the usual" and the Court referenced the lay definition in Webster's Dictionary. *Id* at p. 335. The Fifth Circuit Court of Appeals discredits this position by its holding that it is irrelevant whether a fine is "excessive" in lay terms.

Second, the Supreme Court held that Courts of Appeal must review the proportionality of the fine de-novo. The Fifth Circuit Court of Appeals repudiates this position by

refusing to review proportionality, despite being specifically cited to *Bajakajian* by Petitioner.

The Fifth Circuit Court of Appeals cited as authority *Pharaon v. Board of Governors of Federal Reserve System,* 135 F.3d 148, 155-57 (D.C.Cir.1998). App. B, p.14. *Pharaon* holds that there is a two-part test that the appellate court must follow. First, the fine must be proportionate to the offense, and second, the fine must be below the statutory maximum.

The Fifth Circuit Court of Appeals has abrogated *Bajakajian* and disregarded the first part of the *Pharaon* test by its holding that the Eighth Amendment only applies where the penalty imposed is in excess of the maximum permitted by Congress. This is an absurd ruling because any fine in excess of the statute would be null and void and there would be no reason for a constitutional review.

The EPA and Fifth Circuit Court of Appeals have also ignored the standards set by this Court regarding the role that comparative analysis plays in the excessive fine review. In *Solem v. Helm,* 463 U.S. 277, 291-292 (1983) the Court set out a three-part test to evaluate a potentially excessive fine. One of the parts involves a comparative analysis of prior fines. This issue was discussed again by the Court in *Harmelin v. Michigan,* 501 U.S. 957, 1004-1005 (1991). While the Supreme Court held that comparative analysis is only appropriate in rare cases, it can be useful where the penalty is grossly disproportionate to what has previously been imposed. The EPA and the Fifth Circuit Court of Appeals disregarded agency precedent as an element in an excessive fine review, and miscited to *Butz v. Glover Livestock Commission. Co.,* 411 U.S. 182, 187 (1973) as authority for the proposition that the EPA did not have to

consider prior agency fines when imposing a new fine (App. A at 14a, and App.B at 88a). This decision was made even though the EPA fine was 70.78 times greater than the average TSCA disposal fine, which would qualify it as "grossly disproportionate" to that previously imposed.

This is serious error which should not be left to stand because it invites agencies to act capriciously in total disregard of agency precedent.

In summary, this was an insignificant and dormant soil pile, with marginal PCBs which sat undisturbed and overgrown with weeds in the back of a scrap yard for 10 years with no evidence of any release, with full notice to the EPA, which cost only $84,000 to remediate, where the EPA settled with the owner/operator of the scrap yard for $90,000, and where the EPA in the past imposed an average TSCA fine of $19,000. As a result, how can a $1.345 million fine for Petitioner possibly be proportionate or be consistent with agency precedent? The Fifth Circuit Court of Appeals did not explain why it has elected to challenge the extremely clear U.S. Supreme Court ruling in Bajakajian.

III. THERE IS ACTUAL CONFLICT IN THE FEDERAL COURTS REGARDING WHAT CONSTITUTES A "CONTINUING" DISPOSAL

The EPA has prevailed to-date in this matter because the Fifth Circuit Court of Appeals held that the soil pile at issue was a continuing disposal (and therefore a continuing violation) which both tolled the five year statute of limitations contained in 28 U.S.C. § 2462, and permitted a new fine of

up to $25,000 for each day the pile sat in Houston. [5] This is an issue regarding which there is a division of opinion within the Circuit Courts, District Courts and within the EPA itself. As a result, the EPA failed to provide adequate due process notice to Petitioner regarding what is a continuing violation. The division of opinion and overall confusion in the courts regarding this issue merits review by this Court.

The decisional law regarding what is a "continuing disposal" is split between two camps, those wherein all disposals are continuing (which nullifies all statutes of limitations and enhances penalties) and those where a disposal is generally viewed as a one-time occurrence which commences the applicable statutes of limitation and is limited to a one-time penalty of $25,000.

The following represents some of the court decisions cited by both parties, which set forth the conflict regarding what constitutes a single vs. a continuing disposal:

Single Disposal

Gwaltney v. Chesapeake Bay Foundation, Inc.,
484 U.S. 49, 59-60 (1987).
Citizens suits could not be filed under the Clean Water Act for "wholly past violations" but only for "continuous or intermittent" violations.

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[5] In *3M Company (Minnesota Mining and Mfg.) v. Browner*, 17 F 3d. 1453 (D.C. Cir. 1994), it was settled that the five-year statute of limitations under 28 U.S.C. §2462 applies to administrative proceedings for the assessment for civil penalties under TSCA.

Connecticut Coastal Fisherman Association
Remington Arms Co.,
989 F.2d 1305, 1308-13 (2nd Cir.1993).
The decomposition of 2400 tons of lead shot, previously discharged on land and into adjacent waters, is not a continuing violation.

In the Matter of: City of Detroit,
TSCA Appeal No. 89-85 3 E.A.D. 514 (1991).
The disposal of PCBs in a soil pile which remained undisturbed for 634 days was not a continuing violation under TSCA.

United States v. Telluride Co.,
884 F.Supp. 404 (D. Colo. 1995), rev'd on other grounds 146 F.3d 1241 (10th Cir.1998).
The unlawful excavation and disposal of soil in violation of the Clean Water Act did not constitute a continuing violation.

Bettis v. Town of Ontario, NY,
800 F.Supp. 1113, 1119 (W.D.N.Y. 1992).
Material used to illegally fill wetlands is not a continuing violation of the Clean Water Act.

Continuing Disposal

United States v. Cumberland Farms of Connecticut,
826 F.2d 1151 (1st Cir. 1987).
Cumberland's continuing efforts to dredge and fill the wetlands constituted a continuing violation.

Sasser v. EPA,
990 F.2d 127, 129 (4th Cir. 1993).
Each day that the pollutants remain in the wetlands without a permit constitutes an additional day of violation.

United States v. Reeves,
923 F.Supp 1530 (M.D. Fla. 1996).
An unpermitted discharge of fill materials into wetlands is a continuing violation for as long as the fill remains.

Informed Citizens United, Inc. v. USX Corp.,
36 F.Supp.2d 375, 377 (S.D.Tex.1999).
Federal courts have jurisdiction over illegal dumping, even after the dumping has ceased.

In Re Standard Scrap,
TSCA Appeal No. 87-3 3 E.A.D. 267 (1990).
Failure to properly dispose of PCBs constitutes as long as the PCBs remain in a state of improper disposal.

Those courts which have endorsed the position that every disposal is a continuing disposal/violation, assert that the disposal continues until the material is recovered and properly disposed. The proponents of this argument do not address what would happen if there should be a TSCA disposal into a river or the ocean, where the material could never be recovered. In such a situation, either the disposal and its $25,000 per day penalty would continue **forever** (which is unlikely), or it would be considered a one-time event whose penalty would be capped at $25,000? How can it be equitable for a person who disposes upon land to incur a continuing fine of $25,000 per day, while a person who disposes into water has his or her fine capped at $25,000?

In summary:

> **Was it the intent of Congress to encourage ocean and river dumping because the penalty for such conduct would be a tiny fraction of the penalty for a land disposal?** [Petitioner thinks not.]

Where a disposal occurs and there is no evidence or even allegation of continuing conduct or any quantifiable continuing harm, there is no logical or equitable argument that could be made for a continuing disposal.

There is excellent guidance regarding the continuing offense doctrine, which we believe is relevant to the continuing disposal issue. Those cases hold that statutes of repose should be liberally interpreted, and a continuing offense found only in limited circumstances. *Toussie v. United States,* 397 U.S. 112; 115 (1970). In addition there usually must be a continuing policy, practice or action. *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 380-381 (1982); *Lorance v. AT&T Technologies,* 490 U.S. 900, 911 fn.4 (1989). The EPA has formulated its own version of the "continuing conduct/continuing harm" standard in U.S. EPA PCB Penalty Policy, (1990), p. 13 [A.R. 306]

> "Assessment of such per-day penalties is reserved for repeated acts, or acts that present considerable risk or harm, such as where someone improperly disposes of PCBs on more than one occasion, or when someone illegally imports PCBs on separate occasions." U.S. EPA PCB Penalty Policy, (1990), p. 13 [A.R. 306]

Notwithstanding its own policy, the EPA (and the Fifth Circuit Court of Appeals) somehow found a continuing

disposal by Petitioner even though there were no "repeated acts" and there was no "considerable risk or harm" as the PCBs detected in the pile were barely over the "safe" level of 50 ppm and never migrated from the pile.

The split in the caselaw and the decision by the EPA to ignore its own policy means two things. First, the public has not been provided with adequate and clear notice regarding the what is a continuing disposal. Second, the EPA itself does not have a clear standard to apply, and, as a result, each of its penalty rulings is per se arbitrary and capricious. On this latter point, it has been correctly said:

> "We note however, that in the complex area of environmental regulation, the EPA must create bright lines to separate prohibited and permissible activity." *Beazer East, Inc. v. United States Environmental Protection Agency, Region III*, 963 F.2d 603, 609 (3rd Cir. 1992).

IV. IT IS AN ISSUE OF FIRST IMPRESSION AS TO WHETHER CONGRESS, WHEN IT ENACTED 5 U.S.C. § 664, INTENDED TO RELAX OR ELIMINATE EVIDENTIARY RULES THAT HAVE A STRONG PUBLIC POLICY FOUNDATION

The Fifth Circuit Court of Appeals, in an issue of first impression, permitted the EPA to use subsequent remedial measures as admissions, and based on those and other reasons, to impose liability on Petitioner for the 1985 soil-pile disposal. Those subsequent remedial measures included the retention in 1987 and 1989-1990 of two environmental consulting firms to recommend remedies for the PCB

contamination and the payment by Petitioner in 1995 of the costs of removing the contaminated soil-pile to a disposal facility. See App. B, p.6

The Administrative Procedures Act ("APA") 5 U.S.C. § 664, has been interpreted to exempt federal agencies from following "strict" rules of evidence in their hearing proceedings. The interpretation that there could be a relaxation of some rules of evidence did not evidence an intent of Congress to abolish all rules of evidence, even though this has been the practical effect. While it is understandable that Congress wished to streamline agency proceedings, did Congress intend for agencies to act contrary to public policy by imposing liability based upon, in whole or in part, the use of subsequent remedial measures as admissions of liability? The answer is obvious.

The history of the public policy against using subsequent remedial measures as admissions is strong and has resulted in the enactment of Federal Rule of Evidence 407. The policy is to encourage steps that improve safety. *Ramos v. Liberty Mutual Insurance Co.*, 615 F.2d 334, 341 (5th Cir.1980), cert. den., 449 U.S. 1112 (1980). In addition, subsequent remedial measures are very poor evidence, and are of dubious evidentiary value in proving original negligence or culpability. *In Re Air Crash Disaster,* 86 F.3d 498, 529 (6th Cir.1996). This Court held in *Stedman v. SEC,* 450 U.S. 91, 102 (1981) that one of the intents of Congress in enacting 5 U.S.C. § 664 was to eliminate agency decision-making premised on "poor quality" evidence. Subsequent remedial measures are poor quality evidence, if they are evidence at all of anything of relevance.

In the case at bar, it is common sense that had Petitioner known that the EPA would use subsequent remedial

measures as admissions against it, Petitioner would not have undertaken those measures. Is this what Congress intended? Did Congress intend that toxic site remediations would all remain on hold until the end of all litigation? Again, the answer is obvious. The EPA, in its zeal to impose one of its largest TSCA fines in history, is oblivious to the fact that its new evidentiary interpretation is grossly unfair when retroactively imposed and is clearly contrary to the public health and welfare. U.S. Government policy must always encourage and never discourage subsequent environmental remedial measures, which it has completely failed to do in this instance.

This Court briefly looked at this general issue in *Federal Trade Commission v. Cement Institute,* 333 U.S. 683, 707 (1947). In that case the Court discussed the fact that "rigid rules of evidence" do not generally apply to civil proceedings of the FTC, but the Court went on to discuss that such might not be the case in "criminal or quasi-criminal" cases.

There are two sub-issues in the case at bar. First, should federal agencies be permitted to use subsequent remedial measures as admissions of liability at all? Second, are civil penalty cases "quasi-criminal" proceedings where rigid rules of evidence **should apply** across the board?

These are important issues of first impression which merit review by this Court.

V. CONCLUSION

Petitioner in this case was swept into the internal adjudicatory world of the EPA It is a world where there are no statutes of limitations, and no discovery is permitted.

Neither rules of evidence nor public policy are considered impediments to agency action. Summary judgment is imposed despite the fact that Petitioner asserts that it is not a party which caused or contributed to the "disposal." A punishing fine is imposed without a formal hearing and without standards. The fine is 70.78 times greater than the EPA average because agency precedent is not to be considered. It is considered proper to accept a $90,000 settlement from one co-defendant (owner/operator) and then assess a $1.345 million fine against the other co-defendant (former owner). In this world, there is no rhyme or reason for this disparity, other than the EPA simply chooses to impose excessive penalties on those who elect to litigate. The fine is reviewed internally, with no oral argument permitted by the Petitioner. When the fine is appealed to a real court, the Fifth Circuit Court of Appeals essentially holds that it has no real authority to review the matter.

If Petitioner had been sued in small claims court in Texas for $100, it would have had a trial, would have been able to confront and cross-examine witnesses and would have appeared before a real judge. Even if the EPA had elected to conduct its administrative proceedings by using a Star Chamber, such would preferable to having all proceedings conducted by mail.

Certiorari jurisdiction is warranted in order clarify the law on continuing disposals, to reinforce the prohibition on using subsequent remedial measures as admissions, and to correct the Fifth Circuit Court of Appeals' refusal to follow this Court's Bajakajian decision. Certiorari is also generally needed to protect the rights of parties who increasingly are finding themselves drifting through quasi-criminal agency "pro forma" proceedings, with no real prospects for justice.

The petition for writ of certiorari should be granted.

Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed November 8, 2000]

No. 99-60694

NEWELL RECYCLING COMPANY, INC.,
Petitioner,

VERSUS

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petition For Review of a Final Order of the Environmental Protection Agency

Before DUHÉ, EMILIO M. GARZA and DeMOSS, Circuit Judges.

DUHÉ, Circuit Judge.

Newell Recycling Company, Inc. ("Newell") appeals a final decision of the Environmental Protection Agency's Environmental Appeals Board ("EAB") holding Newell liable

for violating the disposal requirements for polychlorinated biphenyls ("PCBs") established in Section 6(e) of the Toxic Substances Control Act ("TSCA"). The EAB's decision penalized Newell $1.345 million, less an amount paid in settlement by a co-defendant, for violating the TSCA. For the following reasons, we affirm.

BACKGROUND

Newell owned and operated a recycling facility in Houston, Texas, during the 1970's and early 1980's. In 1982, Newell sold the facility to Oklahoma Metal Processing, Inc. d/b/a Houston Metal Processing Company ("HMPC"). In the sale, Newell agreed to "specifically assume any liability resulting from an occurrence prior to the closing date of this sale."

Within two years of the sale, the Texas Department of Health sought soil samples to verify its suspicions of lead contamination at the recycling facility site. Shortly thereafter, Newell Enterprises asked HMPC to authorize Newell Recycling Company, Inc. (i.e., "Newell," the Petitioner in this case), Newell Products of Houston, Inc., and Newell Industries, Inc., to commence testing for lead contamination and cleanup on the site. After the soil samples showed lead contamination, a consultant recommended to Newell that the contaminated soil be removed to a hazardous waste facility for disposal. The consultant noted that HMPC had authorized Newell to perform testing, cleanup, and soil transportation functions at the site.

While superintending lead cleanup operations there in 1985, Newell discovered the PCB contamination that this case

concerns. Electric capacitors seeping PCB-contaminated fluids lay buried in the soil unearthed during the lead contamination cleanup. Newell - although advised repeatedly by another consultant it had hired that the PCB-contaminated soil piled at the site had to be treated or disposed of by methods acceptable to the EPA under the TSCA - waited until after the EPA filed an administrative complaint against it in 1995 for violating the TSCA to remove the soil to a disposal facility. Approximately ten years elapsed, then, from Newell's discovery of the buried capacitors in 1985 to its proper disposal of the PCB-contaminated soil pile in 1995. The record does not explain this delay.

The Presiding Officer granted the EPA an accelerated decision (the equivalent of summary judgment) on its administrative complaint, holding that Newell committed an act of improper disposal by knowingly causing PCB-contaminated soil to be excavated and stockpiled at the site and then "leaving [the soil] there and taking no further clean-up action." In re Oklahoma Metal Processing Co., Inc., No. VI-659C (EPA April 29, 1997) (order granting partial accelerated decision on issue of liability). The Presiding Officer assessed Newell a $1.345 million fine for the disposal violation, less the amount HMPC paid the EPA to settle an action regarding its role in the improper disposal at the site. Newell appealed the Presiding Officer's liability rulings and his penalty assessment decision to the EAB. It affirmed the Presiding Officer's decision. Newell appeals the EAB's decision.

Newell argues that a five-year statute of limitations barred the EPA's TSCA complaint, that on the merits Newell is not liable for an "improper disposal" under the TSCA, and

that the Presiding Officer's application of the EPA's 1990 Polychlorinated Biphenyls Penalty Policy (the "Penalty Policy") generated an excessive penalty that violated Newell's constitutional rights.

DISCUSSION

We must affirm the EAB's decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). See also Amoco Production Co. v. Lujan, 877 F.2d 1243, 1248 (5th Cir. 1989) ("On review of an agency adjudication, . . . the reviewing court must in general affirm the decision unless the agency's action was arbitrary, capricious, or otherwise not in accordance with law").

I. Limitations

28 U.S.C. § 2462 supplies the statute of limitations applicable here:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years of the date when the claim first accrued. . . .

Newell argues that the EPA's improper disposal claim "accrued" when the PCBs polluting the soil pile were "taken out of service." See 40 C.F.R. § 761.3 ("Disposal means intentionally or accidentally to discard, throw away, or

otherwise complete or terminate the useful life of PCBs and PCB Items. Disposal includes spills, leaks, and other uncontrolled discharges of PCBs as well as actions related to containing, transporting, destroying, degrading, decontaminating, or confining PCBs and PCB Items"). Since, Newell asserts, the PCBs were "taken out of service" sometime before 1990, the EPA's claim accrued more than five years before the filing of its TSCA complaint against Newell in 1995 and is thus time-barred. The EPA argues that Newell's TSCA violation -- excavating and stockpiling the soil and then leaving it on the site for ten years before disposing of it in accordance with 40 C.F.R. § 761.60(a), which requires that soil contaminated with PCBs above a certain ppm threshold be disposed of in an EPA-approved incinerator or landfill -- was "continuing" in nature. See InterAmericas Investments, Ltd. v. Board of Governors of the Federal Reserve System, 111 F.3d 376, 382 (5th Cir. 1997) ("A continuing violation applies when the conduct is ongoing, rather than a single event"). The EAB agreed with the EPA. The EAB held that the EPA's TSCA cause of action against Newell did not accrue until the course of conduct complained of no longer continued. See Fiswick v. United States, 329 U.S. 211, 216 (1946) (statute of limitations for continuing offenses runs from the last day of the continuing offense); In re Standard Scrap, TSCA Appeal No. 87-4, 3 E.A.D. 267, 1997 WL 603524, at *2 (EAB Aug. 2, 1990) (Final Decision) ("Failure to [properly dispose of PCBs] constitutes a violation of the regulation, and the violation continues as long as the PCBs remain out of service and in a state of improper disposal"). That is, it did not accrue until 1995, when Newell properly disposed of the soil. If stockpiling the soil was a disposal, we cannot say the EAB's conclusion was arbitrary, capricious, an abuse of discretion or otherwise not in

accordance with law.[1] Because we hold that the EPA's TSCA cause of action against Newell did not accrue for limitations purposes until 1995, we also affirm the EAB's denial of Newell's request for additional discovery. This discovery, Newell claims, would establish that the EPA had actual notice of conditions at the site earlier than five years before the EPA filed its complaint. Information about when the EPA actually knew of the site's conditions is not "significant[ly] probative" of any fact relevant to our statute of limitations determination. See 40 C.F.R. § 22.19(f).

II. Liability

Newell challenges its TSCA liability on two grounds. First, Newell argues that the EAB erroneously held that Newell contributed to the creation of the PCB-contaminated soil pile. Second, Newell contends that if, *arguendo*, it did cause the creation of the soil pile, that act of creation and Newell's subsequent involvement with the pile did not constitute an improper disposal of PCBs within the meaning of the TSCA.

The EAB properly determined that Newell contributed to the creation of the soil pile. The PCB Rule of the TSCA extends civil penalty liability to any "person who violates these regulations." 40 C.F.R. § 761.1(d). "Violators" in this context are those who have "caused (or contributed to the cause of) the [improper] disposal." In re City of Detroit, 3 E.A.D. 514, 526 (CJO 1991).

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[1] See discussion of disposal that follows.

Ample evidence indicates that Newell at least contributed to the creation of the soil pile. Newell contends that a Newell affiliate, not Newell itself, created the pile. The record suggests otherwise. The EAB aptly characterized its contents: Newell "may not have acted alone, but it was certainly an active party in the events constituting the TSCA violation." Newell Recycling Co., Inc. v. United States Environmental Protection Agency, TSCA Appeal No. 97-7, slip op. at 33 (EAB Sept. 13, 1999). Newell, and not one of its affiliates, owned the Fidelity Road site immediately before conveying it to HMPC. In the sale of the site Newell assumed liability for "occurrence[s] prior to the closing date of th[e] sale." This covenant produced Newell's extensive involvement in remedying the lead and PCB contamination at the site. Newell's involvement included, the EAB correctly found: a visit by Newell's owner, Alton Newell, to the site in response to HMPC's demand for remedial action; Newell's two-time (1987 and 1989-90) retention of an environmental consulting firm to recommend remedies for PCB contamination at the site; execution in 1987 of an agreement with HMPC and another party interested in the site tolling the statute of limitations on claims against Newell arising from the site's contamination; and Newell's removal in 1995 of the contaminated soil to a disposal facility at its own expense. Moreover, until this enforcement action, Newell never suggested to the Texas or federal authorities involved in decontamination of the site that some other Newell entity was responsible for the contaminated soil pile.

In view of these facts, the EAB's determination that Newell contributed to the creation of the soil pile was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

Newell, however, argues that if it contributed to the creation of the soil pile, its contribution was not an improper disposal under the TSCA. Newell argues that PCB disposal is a one-time event occurring, in a case like this one, only when capacitors containing PCBs are buried and their contents released into the surrounding soil. Because, Newell contends, there is no evidence implicating Newell in the original disposal of the capacitors, the EPA failed to establish that Newell improperly disposed of PCBs. The EAB rejected this argument, noting that Newell's interpretation of "disposal" would have "no TSCA liability . . . attach even if Newell had taken the pile of contaminated soil from the Fidelity Road site and dumped it into the nearest river, stream, or vacant lot." Newell Recycling Co., Inc. v. United States Environmental Protection Agency, TSCA Appeal No. 97-7, slip op. at 29-30 (EAB Sept. 13, 1999). Such an interpretation, the EAB continued, would subvert the environmental protection goals of the TSCA regime. See In re Samsonite Corp., 3 E.A.D. 196, 199 (CJO 1990) (PCB regulations "should be read in such a way as to further the purposes of the Act, particularly where, as in this case, public health and safety are involved"). At any rate, the EAB concluded, Newell's interpretation of "disposal" fails because it would effectively exclude what the textual definition of disposal cited above indisputably includes: activities undertaken to address known PCB contamination. See 40 C.F.R. § 761.3 ("[d]isposal includes spills, leaks, and other uncontrolled discharges as well as actions related to containing, transporting, destroying, degrading, decontaminating, or confining PCBs or PCB items"). The EAB determined that Newell's involvement with the soil pile, described above, fits this definition of "disposal." Newell Recycling Co., Inc. v. United States Environmental Protection Agency, TSCA Appeal No. 97-7,

slip op. at 31 (EAB Sept. 13, 1999) ("The act of excavating and stockpiling PCB-contaminated soil at the Fidelity Road site is clearly in the nature of an action to 'contain,' 'transport,' and 'confine' PCBs. Moreover, leaving the stockpiled waste abandoned there for years is evidence that the PCB-contaminated soil was 'discarded' within the meaning of the rule").

We cannot say that this determination was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

III. Penalty

Because an agency's selection of an appropriate sanction to effect its policies is an act peculiarly within its institutional competence, our review of the penalty in this case is limited. See Wayne Cusimano, Inc. v. Block, 692 F.2d 1025, 1030 (5th Cir. 1982). An agency's penalty determination "is reviewed with significant deference;" we will not reverse it unless it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. InterAmericas Investments, Ltd., 111 F.3d at 384. Accordingly, although the penalty here strikes us as severe since there was no actual harm, we cannot disturb it.

The Penalty Policy limns a two-part process for PCB penalty assessment. First, the Penalty Policy requires the administrative law judge (the "Administrator") to examine the nature, circumstances, gravity and extent of the violation. Those factors suggest a gravity-based penalty. After the Administrator determines the gravity-based penalty, he or she considers (the second part of the process) the violator's ability

to pay the penalty, the effect of the penalty on the violator's ability to continue to do business, the violator's history (if any) of such violations, the degree of culpability, and "such other matters as justice may require." POLYCHLORINATED BIPHENYLS (PCB) PENALTY POLICY (1990). The Administrator may adjust the gravity-based penalty in view of these factors.

A. The Gravity-Based Penalty

The Penalty Policy makes the gravity-based penalty determination process mostly mechanical by pegging the above-described factors (the nature, circumstances, gravity and extent of the violation[2]) to statistical benchmarks or fixed formulations. So, for example, the Presiding Officer did not err by concluding that the "extent" of Newell's violation was "major;" the Penalty Policy expressly defines violations involving more than 300 cubic feet of contaminated soil as "major," and the soil pile here was approximately 540 cubic feet in size. Id. Similarly, the Presiding Officer correctly characterized the "circumstances" of Newell's violation as "High Range, Level One" under the Penalty Policy.[3] The Penalty Policy states that "any disposal of PCBs or PCB Items in a manner that is not authorized by the PCB regulations" is automatically ranked "High Range, Level One." Id. Because

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[2] Newell challenges the Presiding Officer's treatment of the "circumstances" and "extent" factors, but not his treatment of the "nature" and "gravity" ones.

[3] The Penalty Policy ranks the "circumstances" of a violation as Low, Medium, or High Range, and subdivides each of these categories into two Levels.

discarding and abandoning PCB-contaminated soil in a pile is a disposal not authorized by the PCB regulations, the Presiding Officer rightly characterized Newell's as a "High Range, Level One" violation.

B. Adjustment of the Gravity-Based Penalty

The Presiding Officer may adjust the gravity-based penalty in view of the violator's ability to pay it, the effect the penalty might have on the violator's ability to continue to do business, the violator's history (if any) of prior such violations, the violator's degree of culpability, and such other matters as justice may require. 15 U.S.C. § 2615(a)(2)(B). The "as justice may require" rubric includes whether the violator voluntarily disclosed the violation, any economic benefits the violator reaped from the violation, and any environmentally beneficial measures a violator may perform in exchange for penalty reduction. Newell argues that some of these factors counsel reduction of its penalty, and that the Presiding Officer's refusal to reduce it, in turn, was error.

1. Culpability

The Presiding Officer's determination that the "culpability" factor did not recommend mitigation of Newell's penalty was sound. The "two principal criteria" in the Penalty Policy for assessing culpability are: 1) the violator's knowledge of the particular requirement; and 2) the degree of the violator's control over the violative condition. POLYCHLORINATED BIPHENYLS (PCB) PENALTY POLICY (1990). As noted above, Newell knew the TSCA required more than the excavation and complete abandonment of the PCB-contaminated soil; Newell's environmental

consultants repeatedly told Newell as much. Even though Newell did not own the property on which the soil lay, Newell had extensive control, described above, over the violative condition here. The record does not explain to our satisfaction why Newell waited years to properly dispose of the soil. The Presiding Officer, therefore, appropriately declined to mitigate Newell's penalty on culpability grounds.

2. Voluntary Disclosure

The Presiding Officer correctly declined to adjust the penalty in view of Newell's alleged[4] voluntary disclosure of the TSCA violation. Newell waived this argument by failing to request in its submissions to the Presiding Officer a reduction in the penalty for voluntary disclosure. See In re Britton Construction Co., CWA Appeal Nos. 97-5 & 97-8, slip op. at 22-23 (EAB, Mar. 30, 1999), 8 E.A.D._ (under 40 C.F.R. § 22.30, appellant "may not appeal issues that were

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[4] Waiver aside, nothing in the record indicates that Newell, in fact, voluntarily disclosed the violation here before the EPA initiated its TSCA action. Newell tacitly admits as much in its brief, but argues that the Presiding Officer erroneously denied Newell discovery that "would have provided conclusive evidence that the remediated soil pile was reported to the Texas Department of Health and to EPA [sic]." See Petitioner's Brief at 48. The EAB found this claim "a disingenuous proposition. If Newell had indeed made a voluntary disclosure, then, surely, Newell was in the best position to attest to it. Having failed to do so by affidavit in Response to the Region's motion for penalty assessment, Newell cannot credibly revive this argument on appeal." Newell Recycling Co., Inc. v. United States Environmental Protection Agency, TSCA Appeal No. 97-7, slip op. at 60 (EAB Sept. 13, 1999).

not raised before the presiding officer. As a result, arguments raised for the first time on appeal . . . are deemed waived") (citations omitted).

3. Ability to Pay / Continue to Do Business

The Penalty Policy requires the EPA to assume that an alleged TSCA violator has the ability to pay any fine assessed under the Penalty Policy and, therefore, to continue in business. POLYCHLORINATED BIPHENYLS (PCB) PENALTY POLICY (1990). The alleged TSCA violator may raise the issue of its ability to pay in its answer to the EPA's administrative complaint and "shall present sufficient documentation to permit the Agency to establish such inability." Id. If "the alleged violator fails to provide the necessary information, and the information is not readily available from other sources, then the violator will be presumed to be able to pay." Id. Newell's brief candidly states (and the Presiding Officer and EAB both held) that the record here features "a complete absence of evidence as to Newell's ability to pay and any effect on it's [sic] ability to do business." Petitioner's Brief at 39. Surely Newell was in possession of such information if anyone was. Nothing in the record, moreover, intimates that information regarding Newell's ability to pay is readily available from a source other than Newell. The Presiding Officer, therefore, correctly declined to mitigate the penalty on the basis of Newell's putative inability to pay it.

IV. Constitutional Concerns

Newell also argues that the penalty violated the Eighth Amendment's proscription of excessive fines and Newell's due process rights. Newell's constitutional claims fail.

A. Eighth Amendment Concerns

Newell's argument that the penalty is excessive,[5] and therefore a violation of its Eighth Amendment rights, is erroneous. Newell argues that the Excessive Fines Clause of the Eighth Amendment requires us to consider the value of its fine ($1.345 million) in relation to the magnitude of the offense inspiring it (Newell suggests that the $84,000 it paid to dispose of the soil accurately indicates the magnitude of its offense). See U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"). No matter how excessive (in lay terms) an administrative fine may appear, if the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment. Here, the fine assessed against Newell is only about 10% of the maximum fine for which Newell was eligible under the TSCA. Newell's fine, therefore, does not violate the Eighth Amendment. See Pharaon v. Board of

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[5] Newell also argues that the penalty is excessive when compared to penalties in similar cases. The penalty here, however, need not resemble those assessed in similar cases. See Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973) ("[t]he employment of a sanction within the authority of an administrative agency is . . . not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases").

Governors of Federal Reserve System, 135 F.3d 148, 155-57 (D.C. Cir. 1998) (finding no Eighth Amendment violation because the penalty was within the limits established by the applicable statute).

B. Due Process Concerns

Newell's due process argument also fails. Newell argues that an evidentiary hearing was "required" in this matter, and that the absence of one violated Newell's right to due process of law. Petitioner's Brief at 55. EPA regulations require that a hearing be held at a respondent's request if the party requesting the hearing has raised a genuine issue of material fact. 40 C.F.R. § 22.15; see also In re Green Thumb Nursery, Inc., FIFRA Appeal No. 95-42, 6 E.A.D. 782, 1997 WL 131973, at *8 (EAB Mar. 6, 1997) (Final Order). Similarly, constitutional due process doctrine requires that the person claiming the benefit of due process protections place some relevant matter into dispute. See Codd v. Velger, 429 U.S. 624, 627 (1977) ("[I]f the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute. . . ."); Costle v. Pacific Legal Foundation, 445 U.S. 198, 213 (1980) (permitting the EPA to condition an adjudicatory hearing on "identification of a disputed issue of fact by an interested party"). The Presiding Officer's accelerated decision held that Newell raised no genuine issue of material fact that would necessitate an evidentiary hearing. The EAB agreed. We find no contested issue of fact on penalty in the record. We decline to set aside the penalty on due process grounds.

CONCLUSION

Because the applicable five-year statute of limitations does not bar the EPA's TSCA complaint, because Newell was liable for an "improper disposal" under the TSCA, and because the Presiding Officer's application of the EPA's 1990 Polychlorinated Biphenyls Penalty Policy generated a penalty that was not arbitrary, capricious, an abuse of discretion, constitutionally infirm or otherwise illicit, we affirm.

AFFIRMED.

APPENDIX B

BEFORE THE ENVIRONMENTAL APPEALS BOARD UNITED STATES ENVIRONMENTAL PROTECTION AGENCY WASHINGTON, D.C.

[Decided September 13, 1999]

TSCA Appeal No. 97-7

In re:	)
	)
Newell Recycling Company, Inc.	)
	)
TSCA Docket No. VI-659C	)
	)

FINAL DECISION

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Fulton:

Respondent Newell Recycling Company, Inc. ('Newell") appeals from orders of Administrative Law Judge Edward J. Kuhlmann ("Presiding Officer") dated April 28, 1997, and October 7, 1997. In his April 28, 1997 order, the

Presiding Officer ruled that Newell had, throughout a 529-day period from September 10, 1992, through February 21, 1994, continuously violated 40 C.F.R. § 761.60(a)(4), which prescribes disposal requirements for soil contaminated with polychlorinated biphenyls ("PCBs") at concentrations of 50 ppm or greater. Section 761.60(a)(4) is a rule promulgated under section 6 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2605; violations of section 761.60(a)(4) are therefore unlawful acts pursuant to TSCA § 15, 15 U.S.C. § 2614, for which administrative penalties are assessable pursuant to TSCA § 16, 15 U.S.C. § 2615. In his October 7, 1997 order, the Presiding Officer assessed a penalty against Newell in the amount of $1.345 million, less the amount paid to EPA in settlement by Newell's correspondent in this action, Oklahoma Metal Processing Company, Inc. d/b/a Houston Metal Processing Company ("HMPC").

Newell has appealed both the Presiding Officer's liability decision and his penalty assessment decision. In addition, Newell challenges a February 7, 1997 ruling in which the Presiding Officer denied a motion by Newell for leave to conduct discovery beyond that which is described in section 22.19(b) of EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. § 22.19(b).[1] For the reasons set forth herein, we

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[1] We note that the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. pt. 22, were amended on July 23, 1999, with the amended version of the roles becoming effective on August 23, 1999. *See* 64 Fed. Reg. 40, 138 (July 23, 1999). All citations to the part 22 roles in this decision

affirm the Presiding Officer's liability decision and penalty assessment.

I. *INTRODUCTION*

A. *Overview of the Case*

A number of years before the actions giving rise to this case capacitors containing PCB-contaminated liquids were apparently buried at the site located at 5225 Fidelity Road in Houston, Texas, which is currently owned by HMPC (hereinafter the "Fidelity Road site" or the "HMPC site"). During a cleanup of lead contamination at the site in February 1985, the buried capacitors were discovered and then excavated, along with a large volume of PCB-contaminated soil. While the capacitors themselves were disposed of off-site, the PCB-contaminated soil was left behind in a large pile. It is this excavation and stockpiling of PCB-contaminated soil at the Fidelity Road site that is at the heart of this case.

The complaint in this matter alleges that on September 10, 1992, an EPA inspector discovered the soil pile at the site. Complaint ¶ 7. Samples taken from the soil by the inspector revealed PCBs at levels greater than 50 parts per million - the action level for PCBs under TSCA. *Id.* ¶¶ 14-15. As stated in the complaint, PCB-contaminated soil of this kind must be disposed of either at a TSCA-compliant incinerator or in a chemical waste landfill approved for disposal of such waste. *Id.* ¶ 25. Failure to so dispose of such waste is a

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refer to the roles that were in effect just prior to the issuance of these amendments.

violation of TSCA, giving rise to liability for civil penalties. *Id.* ¶¶ 37-39, Section III (of the Complaint).

The complaint alleges that Newell had been the owner or operator of the Fidelity Road site "from 1974 until approximately 1982," and had then sold it to HMPC. *Id.* ¶ 3. The PCB-contaminated soil, according to the complaint, had been excavated "by Newell, or by a third party at the direction of Newell, and placed in [the] pile at the Houston Facility." *Id.* ¶ 10. In view of the alleged failure to remove and properly dispose of the waste pile, the complaint proposed a civil penalty against Newell and its co-respondent, HMPC, for the 529-day period running from September 10, 1992, through February 21, 1994, totaling $1.345 million. *Id.* Section III.[2]

As discussed more fully below, the Presiding Officer found that the Region had satisfied the essential elements of its complaint and, accordingly, assessed a penalty in this matter of $1.345 million. He found that Newell committed an act of improper disposal by knowingly causing PCB-contaminated soil to be excavated and stockpiled in a corner of the HMPC site, and then "leaving [the PCBs] there and

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[2] The February 21, 1994 closing date for the Region's penalty calculation apparently derives from the fact that this was the date of HMPC's response to a subpoena issued by the Region, which served to confirm that the PCB-contaminated soil was still on-site. As explained below, the contaminated soil was not actually disposed of until considerably later-- between September 20 and 28, 1995. It is unclear from the record why the Region elected not to seek penalties for the period running from February 22, 1994, to September 19, 1995.

taking no further clean-up action." Partial Accelerated Decision on Issue of Liability at 23. In this appeal, Newell contends that it was not involved in the excavation and stockpiling of the soil and did not otherwise engage in any act constituting PCB "disposal." Newell claims that the soil pile was never shown to contain regulated levels of PCBs. Newell maintains that any regulated PCB disposal activity at the HMPC site ended more than five years before the commencement of this action, and that the action is therefore untimely. Newell also raises several arguments in opposition to the Presiding Officer's civil penalty assessment.

B. *Factual Background*

The facts of this case, while somewhat complex, are not materially in dispute. Given their significance to the legal issues raised by appellant, however, they are set out in some detail below.

On September 10, 1992, an EPA inspector conducted a PCB compliance inspection at the Fidelity Road site, owned and operated at that time by HMPC. At the inspection, HMPC Vice President and General Manager Francis Garrigues related to the inspector that the facility had a "historical connection * * * with PCB contamination." Complainant's Exhibit ("CX") 4 at 4 (PCB Compliance Inspection Report).[3] Specifically, according to the inspection

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[3] The exhibit numbers cited in this opinion, both for the complainant and the respondent, are the numbers that the parties have assigned to them in their appellate briefs. They may or may not correspond to the numbers assigned by the

report, Mr. Garrigues advised that the facility had been purchased by HMPC "in 1982 from Newell Recycling (of San Antonio) which recycled lead batteries." *Id.* He went on to state that soil sampling by the Texas Water Commission in 1984 had disclosed the presence of lead contamination, and that during the ensuing excavation of lead-contaminated soil there were found, among other things, a number of buried capacitors. He stated that the capacitors themselves had been removed,[4] but that the contaminated soil in which those capacitors had been buried was still on-site in a pile. The inspector took photographs of the pile of contaminated soil and collected three samples of the soil for laboratory analysis.

The samples were analyzed for PCB content on September 24, 1992, and the resulting report dated October 7, 1992 (CX 5) states that "[t]here was Aroclor 1248 detected in all three samples at levels greater than 50 ppm." Aroclor 1248 is a form of polychlorinated biphenyl subject to regulation under TSCA, and the EPA regulations promulgated thereunder governing the manufacturing, processing, distribution in commerce, and use of PCBs (hereinafter the "PCB Rule"). Significantly, these rules cover, among other things, soil contaminated with specified levels of PCBs. 40 C.F.R. § 761.1(b). *See also* 40 C.F.R. § 761.60(a)(4) (providing that "disposal requirements" apply to "[a]ny non-

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parties to the same exhibits in their pre-heating exchanges in the proceedings before the Presiding Officer.

[4] In reality, six capacitors were still on-site. *See* CX 8 at 16.

liquid PCBs at concentrations of 50 ppm or greater in the form of *contaminated soil,* rags, or other debris") (emphasis added). The pile of soil observed during the September 1992 inspection of the HMPC facility, and immediately thereafter shown to contain Aroclor 1248 in concentrations greater than 50 ppm, was therefore governed by the disposal requirements of the PCB Rule.

HMPC's response to a subpoena *duces tecum* issued to it on or about January 13, 1994, by U.S. EPA Region 6, provides a chronology that is (for all purposes material to the present proceeding) essentially undisputed regarding the continued presence of an uncontrolled, PCB-contaminated soil pile at the HMPC facility.

According to the documents, the Fidelity Road property had been sold to HMPC during 1982 by a seller identified (in the text of the purchase and sale agreement) as "Newell Recycling Co., a Texas Corporation." CX 6 at 1. The purchase and sale agreement contains a number of representations and warranties by the seller (Newell Recycling Co.), one of which, in particular, has an important circumstantial bearing on whether Newell caused, or contributed to the cause of, the unlawful disposal of PCB-contaminated soil. The agreement provides that Newell Recycling Co. "specifically assumes any liability resulting from an occurrence prior to the closing date of this sale." CX 6 at 6 (¶ 2.5(a)).[5] The agreement further includes among the

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[5] The purchase and sale agreement, which was executed on September 8, 1982, contemplated a closing date "not later than October 5, 1982." CX 6 at 14. The specific date on which the

seller's representations and warranties the statement that, to the best of the seller's knowledge, "all the property" to be conveyed "conform[ed] in all material respects to applicable * * * environmental (including air, water and solid waste laws and regulations) * * * laws and ordinances." CX 6 at 8 (¶ 2.9).

Soil sampling at the Fidelity Road property for suspected lead contamination (based on "the nature of the previous work" performed there) was apparently first demanded by the Texas Department of Health, within two years after the sale of the property to HMPC. CX 11 (report by Raba-Kistner Consultants, Inc. ["Raba-Kistner"] dated January 15, 1985[6]) at 1. Indeed, a substantial likelihood of finding lead contamination requiring "cleanup" was evidently assumed, both by the current owner and by the former owner of the property, as of the autumn of 1984. On October 16, 1984, Wayne R. Mathis, Executive Vice President of "Newell

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transaction actually closed is of no particular concern for purposes of this case.

[6] To be precise, the first page of this report is dated January 15, 1985, but some subsequent pages are dated December 26, 1984. The document's authenticity has not been questioned, and thus the noted discrepancy is of no significance.

Enterprises, Inc.,"[7] wrote the following letter to Mr. Garrigues of HMPC:

> Dear Francis:
>
> In the process of our negotiations with the State on the proposed cleanup of the site for lead content, the State has requested that we provide them with a letter from your company authorizing Newell to begin testing and cleanup. Accordingly, if possible, I would appreciate your providing me with such a letter of authorization for Newell Recycling Co., Inc., Newell Products of Houston, Inc., and Newell Industries, Inc.

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[7] Although Mr. Mathis first appears in the record as an executive officer of a Newell entity, he is identified in subsequent correspondence as "of counsel" to the San Antonio law firm Brock & Kelfer (CX 19, CX 22) -- which, by the end of 1989, was evidently renamed Brock & Mathis. *See* CX 18. Notwithstanding his apparent departure for private law practice, however, Mr. Mathis remained closely involved with the situation at the HMPC site

Respondent's Exhibit ("RX") 9 at 7.[8] Mr. Garrigues complied with that request by letter dated October 18, 1994 (CX 14):

> As per your request, please find hereby our authorization to begin testing and perform the clean-up operation of our property located at 5225 Fidelity Road, Houston, TX for the following companies:
>
> - Newell Recycling Co., Inc.
>
> - Newell Products of Houston, Inc.
>
> - Newell Industries, Inc.

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[8] It is in RX 9 that the Board encounters, for the first time, a reference to several different "Newell" entities. As discussed later in this opinion, Newell Recycling Co. (the appellant in this proceeding) argues that if any violation of the PCB Rule was committed in this case, the violation was committed by one of the other "Newell" entities or by some other non-party. The Board will address that contention in due course. For now we note simply that it is already apparent, from the limited chronology recounted thus far, that appellant Newell Recycling Co. was the seller of the property to HMPC (and hence the party that contractually undertook to "assume[] any liability resulting from an occurrence prior to the closing date" (CX 6 at 6)) and that it was also -- logically enough, given its contractual assumption of liability for pre-sale "occurrences" -- among the companies that sought (RX 9) and obtained (CX 14) authorization from HMPC to conduct the lead cleanup at the HMPC property.

> The testing and the clean-up of the site are for lead content.

The documentary chronology resumes with the January 15, 1985 Raba-Kismer report (CX 11) alluded to earlier, which reports the following:

> Mr. Wayne Mathis of Newell collected twelve soil samples and submitted these to [Raba-Kistner] for analysis. * * * Additional samples were collected by [Raba-Kistner] on August 17, 1984 * * *. These samples reveal that lead contamination is present * * *. Results [of additional testing] indicated that the mid and high range samples leached at levels considered hazardous under the provisions of the Resource Conservation and Recovery Act (RCRA).

CX 11 at 1-2. The report concludes with a tentative recommendation that soil in the affected areas be removed and taken to a nearby hazardous waste facility for disposal. CX 11 at 5.

At this point, the documentary record temporarily lapses into silence. A note composed by Mr. Garrigues -- on which we would ordinarily hesitate to rely because it is undated, but which is offered for our examination not only by the Region but also by Newell (RX 6) -- recounts that:

> Between February and August 1985, clean-up operations start. Scrapping [*sic*] 10 inches of soil and piling dirt. Subsequently, the

soil was to be tested again to see if additional scrapping was necessary. During scrapping, electric transformers containing PCB oil are found buried.

Newell Enterprises inc. (John) passes the file to Newell Manufacturing (Scott).

Everything stops.[9]

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[9] Two points should be noted in connection with this document. First, although the document refers to buried "transformers," HMPC's later response to EPA's subpoena clearly states that only "[b]uried *capacitors* were excavated from the HMPC site during the initial cleanup of lead contaminated soil which was conducted by Newell in February, 1985." CX 8 at 16 (emphasis added). HMPC's account refers to a total of 41 buried capacitors, 35 of which were removed from the site on June 23, 1989, and six of which were still on-site as of February 10, 1994. *Id.* at 16-17. *See also* RX 7 at 1-2 ("waste data profile sheet" dated June 23, 1989, referring to removal of "35 PCB capacitors" from the site). Second, in a descriptive index to the exhibits accompanying its appellate brief, Newell asserts that this note "describes Newell Enterprises involvement in excavation of soil pile in 1985." Exhibits to Brief for Appellant at i (filed Nov. 3, 1997). In reality, the note states that an entity called "Newell Enterprises" passed a "file" to an entity called "Newell Manufacturing" at some point after PCB contamination was first encountered. Neither of the named entities is described as having any particular role or "involvement" in the "excavation of [the] soil pile in 1985." Indeed, neither "Newell Enterprises" nor "Newell Manufacturing" was among the entities for which authorization was requested (RX 9 at 7) and granted (CX 14) to participate in the lead cleanup in the first instance.

It appears clear, in any event, that by April 24, 1985, Raba-Kistner had already begun analyzing soil samples from the HMPC site for PCB content. RX 9 at 16.

The next correspondence between buyer and seller is dated August 19, 1985. In that correspondence, Timothy F. Johnson -- identified by his stationery as General Counsel to "The Newell Companies" -- writes to Mr. Garrigues to "bring you up to date on where we are with the PCB cleanup." CX 27 at 1. Mr. Johnson reports, in substance, that the "PCB cleanup" is going to "take longer * * * than what we had anticipated." This is attributed to a delay in obtaining results of a "chemistry analysis that we needed," and to an impending change in the State regulatory structure, that was expected to shift "the authority for this problem" from the Department of Health to the Texas Water Commission. *Id.* Mr. Johnson refers briefly to a proposed cleanup plan involving biological treatment of PCB-contaminated soil, estimates the PCB cleanup cost at "somewhere around $160,000.00," and concludes: "I apologize for the delay in this matter, but I am sure you realize that it is very important to both you and Newell that it be done right the first time through." *Id.* at 1-2.

When the parties next correspond six months later (March 21, 1986), it appears that a dispute is taking shape. Mr. Garrigues writes directly to Mr. Alton Newell of Newell Recycling Co., noting that "we have had a pile of contaminated soil in a corner of our yard for about one year," and threatening to turn the matter over to an attorney if "the cleanup program has not been completed" within the following two months. CX 26.

That letter elicits a response from Mr. Johnson dated April 12, 1986, acknowledging receipt of Mr. Garrigues's letter and "assur[ing] you that we are taking it quite seriously." CX 25 at 1. Mr. Johnson's letter makes no attempt to deflect responsibility for implementation of a cleanup plan away from Newell Recycling Company. It suggests, rather, that because the State regulatory structure is still in flux, "we [*i.e.*, Newell] have not been able to find anyone who will give us final approval on a cleanup plan." *Id.*

The documentary record then advances to August 27, 1986, when Mr. Johnson writes to the environmental consulting firm Lockwood, Andrews & Newnam, Inc. ("LAN"). Although not yet willing to execute a formal agreement for the services of that firm, he writes that "Newell Recycling Company would like for you to proceed to develop a testing plan and begin to execute it." CX 24. Indeed, Mr. Johnson's August 1986 letter presses the Lockwood firm "to move this project along as quickly as possible." *Id.*

No further correspondence appears in the record until January 22, 1987. On that date, with almost two years having elapsed since the discovery of PCB contamination, Mr. Garrigues again writes directly to Alton Newell of Newell Recycling Co. Referring back to his letter of March 21, 1986, Mr. Garrigues indicates that Mr. Newell had personally visited the site shortly after receiving that letter and that "after your personal visit we were really under the impression that thing[s] would start happening fast." Mr. Newell's site visit notwithstanding, however, "[t]en months have passed since then and the situation remains the same as far as we are concerned." CX 23. Mr. Garrigues concludes by stating that HMPC will now begin charging Newell Recycling Co. a

monthly fee "as compensation for not being able to use and enjoy freely the contaminated land. This charge will remain in effect until completion of the clean-up." *Id.*

In May 1987, LAN, having apparently been formally retained by Newell Recycling *(see* CX 24), issues a "Site Clean-Up Interim Report" (CX 9). In the Interim Report, LAN solicits additional guidance from the parties because "the initial sampling results are much higher than anticipated"; moreover, there may well be more bad news still to come, given that "the initial sampling effort did not define the aerial [*sic*] and vertical extent of the contamination." In other words, LAN (and by extension, the parties) faced a potentially more significant job than expected. But the Interim Report was clear and unequivocal in asserting that the problem, whatever its magnitude, absolutely had to be addressed:

> PCB clean-up will fall under the Toxic Substances Control Act (TSCA) Compliance Program. TSCA policy states that all improperly disposed PCB shall be cleaned up to background levels. This has also been interpreted to be the lowest level below 50 ppm practicably attainable through the use of normal clean-up methods.
>
> *At a minimum, that means the [sic] all soil contaminated with greater than 50 ppm PCB must be removed from the site. Wastes with these concentrations must be incinerated or disposed of in a chemical waste landfill.*

CX 9 at 4 (emphasis added).

Perhaps predictably, the ensuing correspondence is between attorneys. At first, however, it appears that Newell Recycling Co. still intends to move forward with the cleanup in some fashion. Attorney Wayne R. Mathis (the former Newell Executive Vice-President) writes, on behalf of Newell Recycling Co., to HMPC's counsel Mark A. Huvard on June 8, 1987. Counsel have apparently met during the previous month, and Mr. Mathis writes that after the meeting "I discussed our fact situation with the consultants I have retained, Lockwood, Andrews & Newnam, Inc. ('LAN')." He indicates that "additional reports" from LAN will be forthcoming and will be made available to HMPC, and that "[m]y staff is currently working on the information to be provided to you * * * and I expect to mail this out sometime next week." CX 22 at 1-2. Copies of this letter are also sent to LAN and to a Mr. John Triesch of "Newell Recycling Co." *Id.* at 2.

During the remainder of June and much of July the attorneys negotiate a three-year tolling agreement (*see* CX 20 [6/16/87 Huvard to Garrigues, enclosing draft]; CX 19 [7/6/87 Mathis to Huvard, enclosing draft]; CX 21 [final agreement with signatures dated as of July 17, 23, and 31, 1987]). A new party has also entered the picture: The parties to the tolling agreement are Newell Recycling Co., Inc., Oklahoma Metal Processing Company, Inc. (d/b/a HMPC), and "J.L.B. Investment Corporation, N.V., a Netherlands-Antilles corporation" (to which "certain rights [have been] assigned" by HMPC with respect to some or all of the Fidelity Road site). CX 21 at 1. In substance, the agreement provides that for the following three years, Newell Recycling

Co. will not interpose a statute of limitations defense to any claim or cause of action that HMPC (or J.L.B.) might bring against it based on the contamination of the Fidelity Road property. The agreement is an effort to keep Newell Recycling's potential liability to HMPC alive for an additional three years, but it says nothing about any plan to proceed with site remediation -- even though the agreement, while in draft form, did note that the Fidelity Road property "has substantial PCB contamination and lead contamination" and that "the parties acknowledge and agree that the problem presented by the PCB contamination and lead contamination is a serious one." CX 20 at 1.

A lengthy period of apparent inactivity follows the execution of the tolling agreement. The silence is broken only alter EPA Region 6 conducts an October 19, 1989 PCB inspection at the Fidelity Road property. In the report describing that investigation, the EPA inspector notes that the PCB-contaminated area has not been marked in any way and that it is accessible to HMPC employees and to pets that are living on-site. Having been advised by HMPC officials that HMPC itself accepts no PCB-contaminated materials for recycling, the inspector reports making contact with Newell Recycling:

> Mr. Eric Green of Newell Recycling indicated that the clean-up was being handled by the law firm Rock & Mathis [*sic*]. Mr. Wayne Mathis of Rock & Mathis was then contacted * * *. Mr. Mathis explained that the previous owner does not feel responsible for the cleanup cost, but that ENSR consultants had been hired to prepare a remediation plan of the facility. Mr.

> Mathis also explained that Newell Recycling is currently involved in a law suit with [the Texas Water Commission] and other property owners regarding a similarly contaminated site in Corpus Christi and that Newell Recycling is currently waiting for the lawsuit settlement and TWC approval of the Corpus site remediation plan before proceeding with any clean-up efforts of the Houston Metal Processing site.

RX 11 at 9. The inspector's inquiry leads him to conclude simply that "the clean-up effort at [HMPC] was dropped for unknown reasons." He urges in his report that, once the safety of plant workers and animals has been ensured, removal and disposal of the contaminated soil should commence right away:

> The contaminated area should be made physically inaccessible to plant employees and pets and any soil migration should be minimized as no erosion control measures have yet been taken. If possible however, the contaminated soil should be removed and disposed of as soon as possible.

RX 11 at 9.

Among the interesting features of the 1989 inspection report is the fact that, once again, representatives of Newell Recycling are not reported to have pointed to the involvement of any other "Newell" entity. Rather, Newell Recycling asserts through counsel that it "does not feel responsible" and has therefore decided to do nothing pending the outcome of

litigation involving a "similarly contaminated" but otherwise unrelated site. Other information in the record tends to corroborate the view that Newell Recycling's disclaimer of responsibility was predicated on the company's belief that an expensive cleanup was beyond its contractual accountability, not because some other Newell entity was the responsible party. *See* CX 18 (December 9, 1989 Letter from HMPC Counsel Mark Huvard to Wayne Mathis).

The record reflects one more effort by LAN to focus the parties' attention on their TSCA obligations. In a January 1990 "Technology Assessment and Economic Evaluation," LAN reminds the parties that its original recommendations with respect to the HMPC site were presented in June 1987, and observes that "[r]ecent contact with the U.S. EPA has prompted renewed interest in cleanup requirements at the site." CX 17 at 1. After reiterating the findings of its 1987 investigation, LAN advises as follows:

> After contact with the U.S. EPA, it was established that PCB's had to be reduced to background levels for a clean site closure. The site could be remediated to a PCB concentration of 25 ppm and deed record [*sic*] for in place closure. This is also predicated on a proper in place closure plan, i.e. groundwater protection and cap. The soil with PCB concentration has to be treated or disposed of by methods acceptable to the U.S. EPA under TCSA [*sic*]. *It was determined that for contaminated soil two methods are allowed by TCSA. The soil either had to be incinerated*

> *or landfilled, both in at [sic] approved facilities.*

CX 17 at 3 (emphasis added). LAN's advice was apparently disregarded.

As recounted at the outset of this discussion, as of September 1992 the pile or piles of contaminated soil were still on-site. Some additional sampling was conducted by HMPC in late 1993, confirming the presence, in one of the soil piles, of a PCB concentration (based on a composite of six samples) of 314 ppm. CX 13. EPA then filed this TSCA enforcement action in March 1995. On May 24, 1995, HMPC and Newell Recycling Company executed an agreement wherein *Newell Recycling Company*[10] agreed to "remove and arrange for the proper and lawful disposal of the 120 ton soil pile * * * at its own expense." RX 15 at 1. On September 22, 1995, HMPC filed a civil action against Newell Recycling Co. and certain of its affiliates and controlling persons in the U.S. District Court for the Southern District of Texas, alleging breach of the May 1995 agreement, breach of the September 1982 agreement for the sale of the Fidelity Road property, fraud, and causes of action arising under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"). CX 1. Between September 20 and September 28, 1995, 495,000 pounds of contaminated soil was finally removed from the site and transported, by the American Ecology Transportation Company, to a disposal facility in Beatty, Nevada. CX 29.

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[10] Conspicuously absent from this agreement is any reference to any of the other Newell entities.

The ultimate cost of removal of the contaminated soil from the HMPC site was, according to Newell, $84,000.[11]

C. *Proceedings Below*

Upon examining the documentary record -- which he aptly described as "a ten year argument over who would pay the cost of removing the contaminated soil" -- the Presiding Officer resolved the liability issues regarding both respondents on cross-motions by EPA Region 6 and by HMPC[12] for accelerated decision. *See* 22 C.F.R. § 22.20(a).[13] With respect to Newell Recycling in particular, the Presiding Officer ruled that liability for improper disposal attached

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[11] There is some uncertainty in the record about what the $84,000 actually represents. In its appellate brief, Newell cites the $84,000 figure, first, as the cost to "remov[e]" the PCB-contaminated soil, but then (a few sentences later) as the "total disposal cost." Brief for Appellant at 47. In a Declaration executed by Newell's attorney, the attorney states: "The pile was removed in 1995 with OMP performing the work and Newell Recycling paying the bill ($84,000)." Nasuti Decl. ¶ P. In any case, the Region has not contested this number, notwithstanding the fact that far higher estimates of projected costs appear elsewhere in the record.

[12] Newell filed a notice with the Presiding Officer indicating that Newell wished to join in the Motion for Accelerated Decision that had been filed by HMPC.

[13] Section 22.20(a) authorizes the Agency's Presiding Officers to render an accelerated decision "as to all or any part of [an enforcement] proceeding * * * if no genuine issue of material fact exists and a party is entitled to judgment as a manner of law."

because Newell Recycling, like HMPC, "controlled the improper disposal of the PCBs at the facility":

> Newell Recycling undertook an analysis of the scope of the problem and had a plan developed for removal of the contaminated soil. A contractor over which Newell Recycling had control removed the contaminated soil into a pile. Newell Recycling knew that the lead-contaminated soil would need to be removed and it knew that the PCB-contaminated soil which it placed in a pile at the facility was disposed of improperly. The original closure plan under which excavation was initiated called for disposal [of lead-contaminated soil] at a hazardous waste disposal facility. Subsequent cleanup plans addressing PCBs called for offsite disposal of regulated levels of PCBs. However, rather than completing the requirements of the original closure plan, or following the later recommendations for site cleanup, Newell discarded the PCBs at the Fidelity Road facility by leaving them there and taking no further clean-up action. Newell's actions in creating the pile, confirming the contaminated soil in a central stockpile, and abandoning it are actions meeting the definition of "disposal" in 40 C.F.R. § 761.3.

Partial Accelerated Decision on Issue of Liability at 22-23 (April 28, 1997). The Presiding Officer denied Newell's Motion for Reconsideration of the liability ruling in an order dated June 4, 1997, whereupon HMPC entered into a

settlement with the Region. The Presiding Officer considered briefs submitted by the Region and by Newell with respect to an appropriate penalty, but did not conduct an evidentiary hearing on the penalty issues. Rather, on October 7, 1997, the Presiding Officer issued a Decision on Complainant's Motion for Assessment of Civil Penalty, assessing a civil penalty against Newell Recycling in the total amount of $1.345 million, which he further ordered to be reduced, dollar-for-dollar, by the amount paid by HMPC pursuant to its settlement agreement with the Region.

Newell Recycling has appealed the Presiding Officer's liability rulings and his penalty assessment decision. In addition, Newell Recycling appeals an earlier order of the Presiding Officer denying Newell's request for leave to take discovery exceeding the parameters of the typical Part *22* exchange of documents. The appeal is timely and the Board has jurisdiction pursuant to 40 C.F.R. § 22.30.

II. *DISCUSSION*

The Board reviews the Presiding Officer's factual and legal conclusions on a *de novo* basis. 40 C.F.R. § 22.31(a). Matters in controversy must be established by a preponderance of the evidence. *Id.* § 22.24; *see In re B.J. Carney Industries,* CWA Appeal No. 96-2, slip op. at 61 (EAB, June 9, 1997), 7 E.A.D. __. As the orders from which appeal is taken are challenged, in part, because they were summary adjudications rendered without an evidentiary hearing, our review will consider whether there are any genuine issues of material fact relative to the issues raised. *See In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 792-93 (EAB 1997); *see also* 40 C.F.R. § 22.20(a) (Presiding Officer

may enter an accelerated decision as to "all or any part" of a proceeding, "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law").[14] In the discussion that follows, we address the challenged discovery ruling, the applicable statute of limitations, the issues surrounding Newell's TSCA liability, and finally the calculation of the penalty.

A. *Discovery*

Newell contends that the Presiding Officer committed reversible error by denying Newell an opportunity to conduct discovery concerning the Region's alleged misconduct in commencing this enforcement action. The applicable regulatory provision is 40 C.F.R. § 22.19(0 ("Other Discovery"), which states in part:

> (1) Except as provided by paragraph (b) of this section [concerning preheating exchanges of exhibits and witness lists], further discovery, under this section, shall be permitted only upon determination by the Presiding Officer:

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[14] We consider the "administrative summary judgment standard, requiring timely presentation [by Newell] or a genuine and material factual dispute, similar to judicial summary judgment under Rule 56, Fed. R. Civ. P." *Green Thumb*, 6 E.A.D. at 793 (citing *In re Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. 772, 780-82 (EAB 1993), *aff'd sub nom. Puerto Rico Aqueduct & Sewer Authority v. EPA*, 35 F.3d 300 (1st Cir. 1994)).

> (i) That such discovery will not in any way unreasonably delay the proceeding;
>
> (ii) That the information to be obtained is not otherwise obtainable; and
>
> (iii) That such information has significant probative value.

We need not consider issues of obtainability, because the Presiding Officer was plainly correct in his determination that the information sought by Newell was not significantly probative.

In its motion for leave to conduct discovery pursuant to section 22.19(f), Newell advised the Presiding Officer that the proposed discovery was intended to demonstrate "an apparent effort [by Region 6] to avoid being sanctioned since its Complaint was filed March 30, 1995 in violation of the five (5) year statute of limitations." Motion for Discovery at 1 (Jan. 19, 1997). "Respondents' burden," Newell explained, "is to establish that EPA had notice of the Site and/or its conditions prior to March 30, 1990." *Id.* at 1-2. The proposed discovery would allegedly have enabled Newell to meet that "burden."

As the discussion below makes clear, Newell's proffered grounds for taking the proposed discovery were flawed. Newell apparently assumed that the applicable statute of limitations would have been triggered by EPA's first "notice" concerning the HMPC site or its "conditions." That assumption, as we will show momentarily, was unfounded, and once it is put aside the discovery proposed to be taken by

Newell bears no relation to any of the matters at issue in this proceeding. The Presiding Officer, accordingly, did not err by denying Newell's January 19, 1997 request for leave to pursue discovery.

B. *Statute of Limitations*

The central issue presented by Newell's appeal concerns the application of the statute of limitations, 28 U.S.C. § 2462, to the essentially undisputed facts of this case. Section 2462 provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years of the date when the claim first accrued * * *.

The question, then, is when the claim for which the Region sought a penalty in this case first "accrued" -- specifically, whether the Region's claim in this case is or is not governed by the doctrine of "continuing violations." As the Board has previously explained:

> The limitations period begins to run when a violation first accrues. The doctrine of continuing violations provides a special rule for determining when a violation first accrues. Under the special accrual rule, the limitations period for continuing violations does not begin to run until an illegal course of conduct is

> complete. Thus, if the doctrine of continuing violations applies * * *, an action for civil penalties may be initiated during the period of continuing violations and up to five years after the violations have ceased.

In re Lazarus, Inc., TSCA Appeal No. 95-2, slip op. at 63 (EAB, Sept. 7, 1997), 7 E.A.D. ___(citations omitted). The Board has noted that the special accrual rule for continuing violations is potentially applicable both to violations of "continuing obligations" and to violations of "continuing prohibitions." *See Lazarus,* slip op. at 65 n.84; *In re Harmon Industries, Inc.*, RCRA (3008) Appeal No. 94-4, slip op. at 50 n.41 (EAB, Mar. 24, 1997), 7 E.A.D. ___.[15] The focus, then, is on determining whether a particular regulatory obligation or prohibition is, or is not, "continuing in nature." *Lazarus,* slip op. at 65-66.

We begin by examining the statutory enactment underlying the regulation allegedly violated. In the TSCA context, the Board has previously undertaken such an examination in the *Lazarus* proceeding. The Board there examined both the statutory provision (TSCA § 6(e)) directing EPA to promulgate PCB disposal rules and the statutory provision (TSCA § 16(a)(1)) authorizing EPA to impose administrative penalties for violation of the rules.

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[15] The Board's decision in *Harmon* was reversed, on grounds unrelated to the statute of limitations, in *Harmon Indus., Inc. v. Browner,* 19 F. Supp. 2d 988 (W.D. Mo. 1998). A challenge to the District Court's decision is currently pending before the Court of Appeals for the Eighth Circuit. *Harmon Indus., Inc. v. Browner,* No. 98-3775.

The relevant portion of section 6(e) states only that "the Administrator shall promulgate rules to * * * prescribe methods for the disposal of polychlorinated biphenyls." It is silent coneeming whether violations of those rules should be deemed continuing in nature. *See Lazarus,* slip op. at 80. The administrative civil penalty provision, section 16(a)(1), is somewhat more illuminating. That provision begins by stating that anyone who violates TSCA section 15 - by, for example, failing to comply with any PCB disposal rule promulgated under TSCA section 6 "shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation." Section 16(a)(1) then proceeds to explain that, for purposes of applying the $25,000-per-violation civil penalty cap, "[e]ach day such a violation continues shall * * * constitute a separate violation of section 15."

In *Lazarus,* the Board recognized that "section 16(a)(1) is evidence that Congress contemplated the *possibility* of continuing violations of TSCA." *Lazarus,* slip op. at 67 (emphasis in original). But the Board further concluded that section 16(a)(1) alone "does not transform every violation of TSCA into a continuing violation." *Id.*, at 68. The Board therefore found it appropriate, in the TSCA context, to examine separately each regulatory requirement or prohibition allegedly violated for indicia of whether that particular requirement or prohibition is "continuing" in nature. In this analysis, "[w]ords and phrases connoting continuity and descriptions of activities that are typically ongoing are indications of a continuing nature * * * [whereas] a continuing nature may be negated by requirements that must be fulfilled within a particular time frame." *Id.* at 66 (footnotes omitted). *Lazarus* demonstrates that, within the confines of the TSCA PCB regulations, certain regulatory provisions exhibit indicia

of "continuity" whereas others implicate a "particular time frame," leading to divergent applications of the limitations bar. *See id.* at 73 (obligation to register PCB transformer with local fire response personnel held continuing in nature); *id.* at 78 (obligation to mark transformer room access door with a prescribed symbol held continuing in nature); *id.* at 82-83 (obligation to prepare and maintain yearly records "on the disposition of PCBs and PCB Items" held *not* continuing in nature). The Board has not previously undertaken such an analysis with respect to 40 C.F.R. § 761.60(a)(4), which Newell is alleged to have violated. The question whether violations of section 761.60(a)(4) are "continuing" in nature, for statute of limitations purposes, is therefore one of first impression.

We are not without reliable guideposts, however, given the outlines of an analytical framework that emerge from *Lazarus* and, more importantly, the detailed attention that matters involving PCB disposal have already received in the Agency's administrative case law. The provision at issue in this case, 40 C.F.R. § 761.60(a)(4), has been interpreted in several previous Agency decisions concerning matters other than the statute of limitations. The reasoning in those decisions, when combined with a close reading of the regulatory text, illumines the issue at hand.

Our point of departure is the text of section 761.60(a)(4):

> Any non-liquid PCBs at concentrations of 50 ppm or greater in the form of contaminated soil, rags, or other debris shall be disposed of:

> (i) In an incinerator which complies with § 761.60; or
>
> (ii) In a chemical waste landfill which complies with § 761.75.

Previous Agency case law has tended to focus on which parties are responsible for compliance (and hence potentially liable for failure to comply). We put that question aside for the moment, although we will revisit the matter at some length in a subsequent section of this opinion. For present purposes, a different feature of the regulation is noteworthy: The regulation contains elements of both obligation and prohibition. It is written in the affirmative -- disposal *shall* occur in one of two specified ways -- but also delivers, clearly and unmistakably, the message that disposal *shall not* occur in any other way. In addressing whether violations of this regulation are continuing in nature, we consider both the obligation and the prohibition. Both aspects of the regulation direct us toward the same result.

Viewed as an obligation, the regulation on its face carries no temporal limitation. It does not, as we expressed the idea in *Lazarus*, prescribe a "requirement[] that must be fulfilled within a particular time frame." On the contrary, nothing in the regulation remotely suggests that the obligation described is discharged or extinguished simply with the passage of time. Instead, the obligation is discharged only with the occurrence of a specified event -- the proper disposal of PCB-contaminated soil at an incinerator or a chemical waste landfill. Until this occurs, compliance with the regulatory mandate has not been achieved, and the responsible party commits, each day, a violation of section 761.60(a)(4).

The regulatory text, accordingly, suggests that an administrative enforcement action for violation of section 761.60(a)(4) is timely if commenced within five years after the noncompliance ends with the *lawful* disposal of the contaminated material.

The same result obtains if we regard section 761.60(a)(4) as a prohibition against methods of disposal other than those specifically authorized. It is useful in this regard to examine the broader Subpart D ("Storage and Disposal") regulatory framework, and to identify the circumstances in which the prohibition does *not* apply, *i.e.*, when it is permissible to do something with PCB-contaminated soil *other than* incineration or landfilling. There are only two such circumstances. First, if contaminated soil was placed in a "disposal site" (which need not be an incinerator or a chemical waste landfill) before the PCB disposal rules were enacted, it is sometimes permissible simply to leave the contaminated soil in place; such soil is, in effect, not regulated under Part 761. *See* 40 C.F.R. § 761.60 (Note). Alternatively, if PCBs in the form of contaminated soil are housed in a storage facility meeting stringent regulatory requirements, the soil may be kept in that facility for up to a year; temporary "storage for disposal," in other words, is a permissible method of handling PCB-contaminated soil until the end of the one-year grace period. *See* 40 C.F.R. § 761.65(a). All other PCB-contaminated soil, however generated or encountered, is governed by section 761.60(a)(4), and may not be addressed in any manner other than incineration or landfilling. Thus, in toto, by forbidding all methods of disposal other than incineration and landfilling, section 761.60(a)(4) effectively divides the universe of PCB-contaminated soil among four mutually exclusive categories:

(1) pre-rule, conditionally unregulated soil (largely unaffected by section 761.60(a)(4));[16] (2) soil lawfully held in storage for disposal *(temporarily* unaffected by section 761.60(a)(4)); (3) soil lawfully disposed of in compliance with section 761.60(a)(4); and (4) noncompliant PCB-contaminated soil.

In its administrative case law, EPA has treated this fourth category of soil -- that which is subject to TSCA regulation, is not lawfully in storage for disposal, and has not been lawfully disposed of in an incinerator or in a chemical waste landfill -- as being "in a state of improper disposal." *In re City of Detroit,* 3 E.A.D. 514, 518 (CJO 1991); In *re Standard Scrap Metal Co.,* 3 E.A.D. 267, 270 (CJO 1990). This is the category of material with which we are concerned in this case.

What is it that terminates a "state of improper disposal"? The answer is not, based on anything stated or implied in the regulations, simply the passage of time. A "state of improper disposal" logically persists until proper disposal occurs, and, indeed, Agency case law so states: "If [PCBs] have been taken out of service for disposal, the responsible party must dispose of the PCBs in accordance with the requirements [of section 761.60(a)(4)]. Failure to do so constitutes a violation of the regulation, and the violation

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[16] The record is unclear as to whether the contaminated soil at issue here was, prior to the February 1985 excavation, in this nonregulated category of material. This is, in any case, immaterial, as we find that it was Newell's excavation and stockpiling of the contaminated soil that both subjected the material to regulation and established Newell's responsibility for proper disposal.

continues as long as the PCBs remain out of service and in a state of improper disposal." *Standard Scrap Metal Co.*, 3 E.A.D. at 269-70. While *Standard Scrap* did not specifically address this issue in the context of a statute of limitations dispute,[17] we find its logic equally compelling here.

Thus, in the final analysis, we simply discern no textual or logical basis -- nor does Newell suggest one -- for regarding unremedied violations of section 761.60(a)(4) as being limited, for accrual purposes, to a single instant, a single day, or any other particular period of time. Indeed, to conclude otherwise would produce an outcome difficult to reconcile with the policy thrust of the statute and the regulations. A party legally responsible for ensuring the proper disposal of PCB-contaminated material, but disinclined to incur the expense, might well have good reason simply to do nothing for five years.

We are mindful of the important purposes served by statutes of limitations generally and by section 2462 in particular -- including, notably, the preclusion of enforcement actions based on claims that have become "stale" with the passage of time. As we recognized in *Lazarus*, "[p]assage of

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[17] *Standard Scrap* addressed the burden of proof with respect to the applicability of the "disposal site" exemption from the PCB disposal regulations. The disposal site exemption appeared in a Prefatory Note preceding 40 C.F.R. § 761.60 and it provided, in part, that "[t]his subpart does not require PCBs or PCB Items landfilled prior to February 17, 1978 to be removed for disposal." The disposal site exemption, which is not at issue in the present case, was deleted from Part 761 effective August 28, 1998. *See* 63 Fed. Reg. 35,384 (1998).

time between the date of a violation and the date of prosecution may serve to obscure basic facts through lost evidence and faded memories." *Lazarus,* slip op. at 64. But as we further explained, "[c]oncerns about staleness * * * are much less compelling when a violative course of conduct that began in the past continues unabated into the five-year period immediately preceding the filing of the complaint." *Id.* at 64-65.

The latter observation brings into focus a second central issue presented by this appeal: specifically, Newell's contention that "disposal" is, by definition, a one-time event that occurs *only* at the moment when PCBs are first taken out of service. If Newell's contention in that regard were correct, improper disposal logically could never "continue" over time or be regarded as a "course of conduct," and the Region's enforcement action against Newell would not only be time-barred, but would also fail for lack of any evidence of Newell's direct involvement in the original burying of these capacitors at the Fidelity Road site (the moment at which, according to Newell, the PCBs were first taken out of service). Having disposed of Newell's statute of limitations arguments, we therefore turn our attention now to this question of the meaning of "disposal" under 40 C.F.R. Part 761, Subpart D, and the other related liability issues that Newell has raised.

C. *"Disposal" and Other Liability Issues*

1. *"Disposal" of PCBs Occurred*

Newell raises an extensive series of objections to the Presiding Officer's liability ruling, none of which raises a genuine issue of material fact. First, and most prominently, Newell contends that the Presiding Officer committed reversible error when he concluded that Newell had engaged in conduct meeting the definition of "disposal" under the PCB Rule. Newell's specific contention in this regard is that "disposal" constitutes a one-time occurrence, and that in this case disposal occurred only when the capacitors containing PCBs were originally buried and their contents released into the surrounding soil. According to Newell's theory, the subsequent excavation and stockpiling of PCB-contaminated soil could thus not constitute "disposal" within the meaning of the PCB Rule. Because the Region did not produce evidence implicating Newell in the original disposal of the capacitors, Newell argues, the Region failed to establish that Newell committed an act constituting unlawful disposal under 40 C.F.R. § 761.60(a)(4).

We note at the outset that, if Newell's interpretation of disposal as a one-time occurrence were correct, no TSCA liability would attach even if Newell had taken the pile of contaminated soil from the Fidelity Road site and dumped it into the nearest river, stream, or vacant lot. Such an interpretation would be difficult to reconcile with the environmental protection goals of the TSCA regulatory regime. *See In re Samsonite Corp.*, 3 E.A.D. 196, 199 (CJO 1990) (PCB regulations "should be read in such a way as to

further the purposes of the Act, particularly where, as in this case, public health and safety are involved") (citing TSCA § 6(e)(2)(B), 15 U.S.C. § 2615(e)(2)(B)); 15 U.S.C. § 2601 (b)(2) (calling for regulation of"chemical substances and mixtures which present an unreasonable risk of injury to health or the environment").

In any case, Newell's interpretation of "disposal" is inconsistent with the regulatory definition of "disposal" at 40 C.F.R. § 761.3, and thus must fail. This section provides:

> *Disposal* means intentionally or accidentally to discard, throw away, or otherwise complete or terminate the useful life of PCBs and PCB Items. Disposal includes spills, leaks, and other uncontrolled discharges of PCBs as well as actions related to containing, transporting, destroying, degrading, decontaminating, or confining PCBs and PCB Items.

It is true, as Newell emphasizes, that an act of "disposal" occurs when the "useful life" of PCBs is first brought to an end. Newell is correct, therefore, in asserting that PCB "disposal" occurred when the capacitors were buried at the Fidelity Road site and their contents leaked into the surrounding soil. Section 761.60(d)(1) of the PCB Rule expressly confirms that this is so: "Spills and other uncontrolled discharges of PCBs at concentrations of 50 ppm or greater constitute the disposal of PCBs." 40 C.F.R. § 761.60(d)(1). But the regulatory definition of disposal includes far more than spills and other uncontrolled discharges, and it expressly embraces activities undertaken to

address known PCB contamination. Thus, 40 C.F.R. § 761.3 states that "[d]isposal includes spills, leaks, and other uncontrolled discharges as well as actions related to containing, transporting, destroying, degrading, decontaminating, or confining PCBs or PCB items." The act of excavating and stockpiling PCB-contaminated soil at the Fidelity Road site is clearly in the nature of action to "contain," "transport," and "confine" PCBs. Moreover, leaving the stockpiled waste abandoned there for a period of years is evidence that the PCB-contaminated soil was "discarded" within the meaning of the rule. Accordingly, the Presiding Officer correctly applied the regulatory definition by holding that Newell committed an act of improper disposal by knowingly causing PCB-contaminated soil to be excavated and stockpiled in a corner of the HMPC site, and then "leaving [the PCBs] there and taking no further clean-up action." Partial Accelerated Decision on Issue of Liability at 23.[18]

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[18] Also supportive of the Presiding Officer's analysis is the Note preceding the disposal regulations in Part 761, Subpart D. (Although it has since been deleted, *see supra* note 17, the interpretive Note prefacing the disposal rules was in effect throughout the period of the violations at issue in this case.) Among other things, the Note indicates that PCBs "landfilled" before February 17, 1978 need not be "removed for disposal." The Note makes clear, however, that those PCBs become subject to the Subpart D disposal requirements if they are excavated: "[I]f such PCBs or PCB Items are removed from the disposal site, they must be disposed of in accordance with this subpart."

2. *PCB "Disposal" Need Not Involve "Exacerbation" of Pre-Existing Site Conditions*

Newell next argues that even if stockpiling and abandonment of PCB-contaminated soil does satisfy the regulatory definition of disposal, that definition should be supplemented by an implied requirement of "exacerbation." According to this argument, EPA cannot establish a violation of the disposal rules unless it can show conduct meeting the definition in section 761.3 and, in addition, show that the conduct "exacerbated" the environmental conditions at the site by, for example, causing contamination of previously uncontaminated areas of the affected site. Because we find nothing in section 761.3 that supports augmentation with this additional requirement, we reject Newell's argument that proof of "exacerbation" is required.[19]

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[19] In support of its contention that exacerbation should be regarded as an element of a PCB disposal violation, Newell cites four cases, all arising under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*: *Alcan-Toyo America, Inc. v. Northern Illinois Gas Co.*, 881 F. Supp. 342 (N.D. Ill. 1995); *Ganton Technologies, Inc. v. Quadion Corp.*, 834 F. Supp. 108 (N.D. Ill. 1993); *Kaiser Aluminum & Chemical Corp. v. Catellus Development* Co., 976 F.2d 1338 (9th Cir. 1992); and *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988). Based as they are on a different statutory scheme and text, we find them inapposite to the maner at hand. We also note that, of the cases cited, only one, *Alcan-Toyo*, even arguably stands for the proposition for which it is advanced. Even that case, however, stands for the narrow proposition that one court, in assessing relative fault for purposes of an equitable allocation of

3. *There Was Sufficient Evidence of Newell Recycling Company's Involvement in the Disposal Violation*

An introductory provision of the PCB Rule (40 C.F.R. § 761.1 ["Applicability"]), citing the relevant statutory language, states that civil penalty liability extends to "any person" who fails to comply with the regulatory requirements:

> Section 15 of the Toxic Substances Control Act (TSCA) states that failure to comply with these regulations is unlawful. Section 16 imposes liability for civil penalties upon any person who violates these regulations, and the Administrator can establish appropriate remedies for any violations subject to any limitations included in section 16 of TSCA.

40 C.F.R. § 761.1(d). With respect to cases involving improper disposal of PCBs, administrative case law supports the view that, "violators" in such cases include those who have "caused (or contributed to the cause of) the disposal." *In*

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response costs in a CERCLA contribution action between responsible parties, considered excavation and stockpiling of tainted soil that causes exacerbation of site conditions materially more blameworthy than similar activity that does not cause such exacerbation. There is nothing in *Alcan* that persuades us that there is or should be an implied "exacerbation" requirement in all environmental statutes and regulations that employ the term "disposal." *Thus, Alcan* notwithstanding, we conclude that Region 6 was not required to produce evidence of exacerbation in order to establish Newell's liability for violating 40 C.F.R. § 761.60(a)(4).

re City of Detroit, 3 E.A.D. 514, 526 (CJO 1991). With that in mind, we turn now to Newell's claim that the evidence before the Presiding Officer in this case was not sufficient to establish Newell's responsibility for a disposal violation.

Newell contends that the Presiding Officer committed error by concluding that Newell Recycling Company, rather than one of its affiliates, was a party responsible for any violation of the PCB disposal rules that may have occurred at the Fidelity Road site. That contention is untenable when viewed against the undisputed facts. Newell Recycling Company may not have acted alone, but it was certainly an active party in the events constituting the TSCA violation. Newell Recycling Company was the owner of the Fidelity Road site immediately before its conveyance to HMPC. In conveying the property, Newell Recycling contractually assumed responsibility for on-site "occurrences." Indeed, the 1985 cleanup of lead contamination, the attendant discovery of PCB contamination and creation of the PCB waste pile, and the subsequent efforts to remediate PCB contamination all flowed proximately from this covenant by Newell Recycling. Newell Recycling's owner, Alton Newell, was shown to have visited the site in response to HMPC's demand for a remedial response. Until this enforcement case, Newell Recycling never so much as suggested that some other Newell entity was actually responsible for the contaminated soil pile, and the record is devoid of any evidence that the work in 1985 was undertaken without Newell Recycling's participation. Newell Recycling executed a tolling agreement with respect to claims arising from the contamination of the HMPC site in July 1987. Newell Recycling, through Wayne Mathis, hired LAN to make recommendations with respect to a PCB cleanup both in 1987 and in 1989-90. Newell Recycling was contacted by

the EPA inspector in October 1989 and did not, so far as the record discloses, point the inspector toward one of its affiliates. Finally, it was Newell Recycling that entered into an agreement, in May 1995, to undertake the removal of the PCB-contaminated soil at its own expense. Given Newell's multiple contacts with this matter, including contractual and other undertakings to do removal work, we conclude that it is more likely than not that the actual physical undertaking of the removal work was performed pursuant to Newell's direction and control. Accordingly, we find that Newell Recycling did, indeed, cause, or contribute to the cause of, the unlawful disposal of PCB-contaminated soil. Thus, the Presiding Officer did not err in concluding that Newell Recycling was a liable party for the PCB disposal violation at issue in this case.

4. *There Was Sufficient Evidence of Regulated PCB Concentrations in the Soil Pile*

Newell claims that Region 6 failed to prove a violation of the PCB disposal rules because it did not sufficiently establish the presence of regulated PCB concentrations in the soil at the Fidelity Road site either as of September 1992 or as of February 1994. Significantly, Newell cites neither expert opinion nor probative evidence in support of its contentions. With respect to the September 1992 soil sampling results, Newell speculates that the samples might either have been taken improperly or analyzed improperly. With respect to the PCB concentration as of February 1994, Newell speculates that "natural bioremediation, dilution or other factors may have teamed up to modify any contaminant levels that might have existed in 1992." Brief for Appellant at 23-24. Newell's speculation is inadequate to create a genuine issue of material

fact regarding the presence or absence of regulated PCB concentrations in the soil.

As to the September 1992 testing, Newell complains that "it was provided with no hearing at which Region 6 experts could be cross-examined." Brief for Appellant at 23. Newell misconstrues the nature of summary adjudication. As the Board observed in *In re Dos Republicas Resources Co.*, 6 E.A.D. 643 (EAB 1996), it is necessary to oppose a properly supported motion for summary adjudication "by referencing probative evidence in the record, or by producing such evidence." *Id.* at 662 (citations omitted). "Summary judgment may not be avoided by merely alleging that a factual dispute may exist, or that future proceedings may turn something up." *Id.* (citing *United States v. Potamkin Cadillac Corp.*, 689 F.2d 379, 381 (2d Cir. 1982)). *See also In re Clarksburg Casket* Co., EPCRA Appeal No. 98-8, slip op. at 12-19 (EAB, July 16, 1999), 8 E.A.D. ___ (respondent's defense, though "theoretically possible," could not prevent the entry of an accelerated decision against respondent, where respondent failed to produce probative evidence in support of the defense). Here, Region 6 produced evidence in support of its Motion for Accelerated Decision demonstrating the presence of regulated concentrations of PCBs in the soil pile as of September 1992. With the Region having produced such evidence, it was incumbent upon Newell -- to avoid summary adjudicaton of that particular issue -- to go beyond mere allegation and speculation by presenting some evidence indicating possible sampling improprieties and/or laboratory errors. The Presiding Officer was not required to conduct an evidentiary hearing based solely on Newell's unsubstantiated concern that it might uncover such evidence in the course of cross-examination.

The same analysis holds tree with respect to Newell's conclusory assertion that "natural bioremediation" or other means of dilution "may have" reduced PCB concentrations in the soil pile below regulated levels before February 21, 1994, *i.e.*, the end of the period for which Region 6 sought penalties in this action. Newell could not avoid summary adjudication by offering sheer speculation concerning what "may have" happened to the contaminated soil between September 1992 and February 1994. It was incumbent upon Newell to offer countervailing evidence sufficiently probative to create a genuine issue for resolution at a hearing, but Newell made no attempt to do so.

We note that Newell, having managed the disposal of the PCB-contaminated material in 1995, was in a position to conduct its own tests of the material at that time. Had Newell come forward with evidence that, at that later date, PCBs were no longer present at levels of concern, its contentions might have greater force. But this Newell did not do. Because Newell failed to offer any such evidence, the Presiding Officer did not err when he resolved the issue in the Region's favor by means of summary adjudication.

D. *Penalty Issues*

1. *Evidentiary Hearing*

Newell argues, preliminarily, that it *per se* impermissble for the Presiding Officer to assess a penalty against it without first conducting an evidentiary hearing. Newell relies on 40 C.F.R. § 22.15, which states that "[a] heating upon the issues raised by the complaint and answer shall be held upon request of respondent in the answer." We

have held, however, that an oral hearing (as opposed to an opportunity to obtain a ruling from the Presiding Officer on the documentary record) is required only if the party requesting the hearing raises a genuine issue of material fact. *In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 792-93 (EAB 1997).[20] As explained fully below, we find that Newell's penalty arguments fail to raise a genuine issue of material fact and that, consequently, Newell was not entitled to an evidentiary hearing. We similarly find that the Presiding Officer did not err in applying the law to the unrefuted facts before him.

2. *Gravity Based Penalty*

Pursuant to EPA's April 9, 1990 Polychlorinated Biphenyls Penalty Policy ("Penalty Policy"), which the Presiding Officer applied in this case, penalties for PCB Rule violations are calculated in two stages: "(1) determination of a 'gravity based penalty' (GBP), and (2) adjustments to the gravity based penalty." Penalty Policy at 1. The Penalty

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[20] EPA's use of an "administrative summary judgment" procedure was expressly approved by the First Circuit in *Puerto Rico Aqueduct & Sewer Authority v. EPA*, 35 F.3d 300 (1st Cir. 1994), *aff'g In re Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. 772 (EAB 1993). We reject Newell's suggestion that the procedure violates the Administrative Procedure Act or works a denial of due process. *See Green Thumb*, 6 E.A.D. at 792 ("Even the constitutional right to due process requires that the person claiming the benefit of that due process must first place some relevant matter into dispute.") (citing *Codd v. Velger*, 429 U.S. 624, 627 (1977)).

Policy implements the requirements set forth in TSCA section 16(a)(2)(B), which provides:

> In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, and history of prior such violations, the degree of culpability, and such other matters as justice may require.

Under the Penalty Policy framework, the first four statutory factors -- nature, circumstances, extent, and gravity -- are reflected in the proposed GBP, whereas the remaining statutory factors (the specified characteristics of the violator and "such other matters as justice may require") are reflected in adjustments to the proposed GBP.

Before the Presiding Officer, Newell Recycling made the following arguments in response to the gravity based penalty proposed by Region 6:

> (1) Region 6 failed to quantify, or failed to reliably quantify, the amount of material involved in the violation, and should therefore, by default, have characterized the violation as "minor" in extent for purposes of a GBP calculation. Opposition by Respondent Newell Recycling Company, Inc. to Region 6's Proposed Penalty at 2 (Aug. 8, 1997) ("Penalty Opp.");

> (2) The Region should not have characterized the "circumstances" of the violation, for purposes of applying the Penalty Policy's GBP matrix, as "High Range, Level One," because that characterization "bears no rationale [sic] relationship to any human health concerns." Penalty Opp. at 3. *See also id.* at 12 (arguing that the Region's penalty proposal is "outrageous" in the context of this "piddling little case").

The Presiding Officer concluded that neither of those contentions created a genuine issue of material fact with respect to the appropriateness of the Region's penalty proposal, and that both contentions were erroneous as a matter of law. Newell advances both contentions again in its appellate brief. Brief for Appellant at 41-44. For the following reasons, the Board holds that the Presiding Officer did not err on either point.

a. *Extent*

As a general matter, the Penalty Policy provides for three possible "extent" classifications: Minor, Significant, and Major. According to the Penalty Policy, "extent," as used in the statute, is understood to refer to "the 'extent' of potential or actual harm from a given violation." Penalty Policy at 1. In order to classify disposal violations, in particular, with respect to extent of potential or actual harm, the Penalty Policy looks to the amount of material involved in the violation and adjusts that amount, in certain circumstances, to account for the material's PCB concentration. Where, as here, the volume of PCB fluid involved in a disposal violation is not

ascertainable, the amount of material for penalty calculation purposes is measured either in terms of surface area (*i.e.*, square footage of contamination, for fresh spills onto the ground or some other surface) or volume of material contaminated (*i.e.*, cubic feet). Because this case involved soil contaminated over time as a result of the burial and leakage of PCB articles rather than a spill onto a measurable surface, the Region appropriately looked to the volume of the soil involved in the improper disposal. When soil volume is used, the "extent" classifications are:

- less than 60 cubic feet = Minor
- between 60 and 300 cubic feet = Significant
- more than 300 cubic feet = Major.

Penalty Policy at 6-7. Finally, the Penalty Policy states that *no* concentration adjustment is to be applied "when the PCB material is measured by a measure for solids other than weight. * * * The cost of disposal of such materials is not dependent on their concentration of PCBs. Accordingly, to allow adjustments for lower concentration might remove the economic incentives to dispose of these materials properly." *Id.* at 9.

As noted previously, during an October 1989 inspection of the HMPC site, EPA's inspector observed "two soil piles contain[ing] approximately 20 cubic yards each." *See* RX 11 at 8. With its brief to the Presiding Officer concerning penalty issues, Region 6 submitted the Declaration of EPA environmental scientist Jeffrey Jay Robinson dated July 18, 1997. Robinson states that he determined the "extent" of Newell's disposal violation based on one of the two 20-cubic-yard soil piles shown to have been present at the HMPC

site during October 1989. Robinson explains that "the 20 cubic yards exceeded the 300 cubic feet waste quantity for Major Extent Disposal Violations (a cubic yard equals 27 cubic feet; 20 cubic yards x 27 cubic feet per cubic yard equals 540 cubic feet). Therefore, the extent of the disposal is Major under the Penalty Policy." Robinson Declaration at 2.

Newell claims on appeal, as it did before the Presiding Officer, that a penalty could not properly be based on the 540-cubic-foot volume of the soil pile because the record contains "insufficient data for an expert opinion to be formulated regarding the quantity of regulated substances involved." Brief for Appellant at 42. To support that contention, Newell restates an argument that we have previously encountered among Newell's defenses to liability, namely, that EPA's sampling of the soil pile in September 1992 was inadequate to establish contamination of the soil with regulated levels of PCBs.

As we have already held in connection with Newell's defense to liability, Newell cannot avoid summary adjudication simply by speculating that the 1992 sampling and analysis of the soil pile may have produced an erroneous result. Newell must offer probative evidence indicating that improper sampling and/or faulty laboratory analysis may in fact have occurred. Newell offers no such evidence. Accordingly, the Presiding Officer did not err by ruling that, for purposes of applying the Agency's PCB Penalty Policy,

Newell's violation should properly be characterized as "major" in extent.[21]

b. *Circumstances*

The circumstances of the violation must also be classified in order to arrive at a gravity based penalty under the Penalty Policy framework. The Penalty Policy creates six different classifications, labeled, in decreasing order of the violation's "probability of causing harm to human health or the environment," as follows: High Range - Level 1, High Range - Level 2, Medium Range - Level 3, Medium Range - Level 4, Low Range - Level 5, and Low Range - Level 6. Penalty Policy at 9. All disposal violations are classified under the Penalty Policy as either High Range - Level 1 or Medium Range - Level 3. Penalty Policy at 1011. The Policy refers to the Level 1 disposal violations as "major disposal" violations and to the Level 3 disposal violations as "minor disposal" violations. These "major" and "minor" designations are unrelated to the "major" and "minor" designations used in classifying the *extent* of a violation. *Id.* at 9 (footnote). As discussed previously, the extent of a disposal violation is based on the quantity of material involved in the violation combined, in certain instances, with the PCB concentration present in that material. The"circumstances" of a disposal

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[21] Because the 1989 inspection report contains sufficient evidence of the volume of soil involved in this violation, we do not consider or address the Presiding Officer's suggestion that, in the alternative, evidence of soil volume could be derived from the September 1995 hazardous waste manifests prepared in connection with the ultimate removal of the soil from the HMPC site.

violation -- level 1 or level 3 -- are determined quite differently.

The Penalty Policy describes level 3 disposal violations only by example:"An example of a [level 3] disposal violation is a leak in which a PCB Article has PCBs on any portion of its external surface, but the PCBs did not run off the surface." Penalty Policy at 11. That example certainly does not seem to capture the essence of the violation at issue here, in which PCBs surely did not remain confined to the surface of a particular article without "running off" or otherwise escaping into the surrounding environment. The violation must therefore be assigned to circumstance level 1, which includes:

> any significant uncontrolled discharge of PCBs, such as any leakage or spills from a storage container or PCB Item, failure to contain contaminated water from a fire-related incident, *or any other disposal of PCBs or PCB Items in a manner that is not authorized by the PCB regulations* * * *

Penalty Policy at 10 (emphasis added). Because the discarding and abandonment of PCB-contaminated soil in a pile constitutes "disposal * * * in a manner that is not authorized by the PCB regulations," the Presiding Officer did not err by classifying the circumstances of this violation as "High Range - Level 1."

Newell's only contention to the contrary is essentially a legal argument -- that the level 1 versus level 3 distinction should depend, at least in part, on the PCB concentration of

the material involved in the violation. Brief for Appellant at 44. What Newell's argument overlooks is that the "extent" component of the gravity based penalty is where concentration adjustments, if any, are made. No such adjustment was made in the "extent" component in this case because, as explained in the relevant section of the Penalty Policy, disposal costs for a given volume of PCB-contaminated soil do not vary with the specific concentration of PCBs that are present; concentration adjustments are unwarranted where, as in this case, the "extent" of the violation is measured in cubic feet. *See* Penalty Policy at 9.

For all of the foregoing reasons, the Presiding Officer did not err in determining that there were no genuine issues of material fact in dispute relative to the calculation of a gravity based penalty or when, having consulted the "matrix" at page 9 of the Penalty Policy, he concluded that $25,000 was an appropriate gravity based penalty for each violation at issue in this case.

3. *Separate Penalty for Each Day of Violation*

Section 16(a)(1) of TSCA provides for administrative civil penalties not to exceed $25,000 "per violation," and it provides that for purposes of applying the penalty limit, "[e]ach day such violation continues shall * * * constitute a separate violation." In this action Region 6 alleged that Newell had continuously violated the PCB disposal requirements from September 10, 1992 through February 21, 1994 -- a period of 529 days. It requested a full $25,000 penalty for the first day of violation, and ten percent of that amount ($2,500) for each of the 528 subsequent days. Although Newell objected to the proposed imposition of per-

day penalties before the Presiding Officer,[22] the Presiding Officer turned aside that objection, Penalty Decision at 7-8, and Newell has not made any similar argument on appeal. Accordingly, the total gravity based penalty assessment stands at $1,345,000 ($25,000 + [528 x $2,500]), less a reduction based on the settlement between EPA and HMPC, as discussed *infra*. We now turn to Newell's claims for downward adjustments to the gravity based penalty.

4. *Adjustments Proposed by Newell*

On appeal, Newell identifies nine factors that, in its view, warrant downward adjustment of the civil penalty. These factors are: (1) the Region's failure to join other "responsible parties" in its enforcement action; (2) disclosure of "the alleged problem" to "the State of Texas (and EPA) in 1985 and again in 1987"; (3) lack of environmental harm resulting from the disposal violation; (4) the eventual removal of the soil pile at an alleged cost of $84,000; (5) the Region's refusal to "credit" Newell with the alleged $84,000 removal cost; (6) the size of the payment required to be made by HMPC under its settlement with the Region; (7) the Region's "refusal to use the BEN model" in calculating a proposed penalty; (8) the Region's "inaction" between 1985 and the date of commencement of the enforcement action; and (9) the fact that lower penalties have been assessed in certain other TSCA penalty actions that have been the subject of administrative appeals.

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[22] Newell's objection was erroneously based on a superseded 1980 penalty policy. *See* Penalty Opp. at 7-8.

a. ***Estoppel Arguments (Factors 5 and 8)***

We first address a pair of mitigation arguments raised by Newell that are in the nature of estoppel claims, specifically (1) the claim that Region 6 acted inequitably by commencing the enforcement process after a period of inaction, and (2) the claim that Region 6 "reneged" on a commitment to deduct Newell's cleanup costs from whatever civil penalty the Region might seek in an enforcement action. Brief for Appellant at 48. We conclude that there are no genuine issues of material fact in dispute relative to these claims and that, consistent with the Presiding Officer's analysis, the conduct alleged by Newell does not give rise to an estoppel against the government.

This Board examined equitable estoppel principles in *In re B.J. Carney Industries*, CWA Appeal No. 96-2 (EAB, June 9, 1997), 7 E.A.D. __. There, the Board explained that the circumstances in which the government may be equitably estopped are extremely limited, and "'it is well settled that the Government may not be estopped on the same terms as any other litigant.'" *Id.*, slip op. at 39 (quoting *Heckler v. Community Health Services*, 467 U.S. 51, 60 (1984)).[23] The Board further explained:

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[23] There are sound reasons for limiting estoppel claims against the government: "When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." *Heckler v. Community Health Services*, 467 U.S. at 60, *quoted in B..J. Carney*, slip op. at 39.

> A party seeking to estop the government bears a heavy burden of demonstrating the traditional elements of estoppel and some "affirmative misconduct" on the part of the government. *United States v. Hemmen,* 51 F.3d 883, 892 (9th Cir. 1995). This means that "a party asserting equitable estoppel against the United States must demonstrate that there was affirmative misconduct upon which the party reasonably relied to its detriment. *In re Wego Chemical & Mineral Corp.*, 4 E.A.D. 513, 522 (EAB 1993).

Id. See also Linkous v. United States, 142 F.3d 271,277 (5th Cir. 1998) ("Courts have applied estoppel to the federal government only in the narrowest of circumstances. In order to establish estoppel against the government, a party must prove affirmative misconduct by the government in addition to the four traditional elements of the [equitable estoppel] doctrine.").[24] Against the backdrop of these principles, as discussed below, we think it apparent that Newell's two estoppel arguments are unavailing.

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[24] Affirmative misconduct" in this context refers to "an affirmative misrepresentation or affirmative concealment of a material fact by the government." *Linkous,* 142 F.3d at 278. The "traditional elements" required to be proved in addition to affirmative government misconduct are: "(1) that the party to be estopped was aware of the facts, and (2) intended his act or omission to be acted upon; [and] (3) that the party asserting estoppel did not have knowledge of the facts, and (4) reasonably relied on the conduct of the other to his substantial injury." *Id.* (citing *United States v. Bloom,* 112 F.3d 200, 205 (5th Cir. 1997)).

Credit for Clean up Cost Ultimately Incurred -- Newell argues that Region 6 committed misconduct by "refus[ing] to credit [Newell] for the $84,000 expended to remove the soil pile." Brief for Appellant at 48. In its brief, Newell claims that representatives of the Region "presented to [Newell] that such remediation, if accomplished, would be factored into the overall civil penalty that Region 6 was seeking." *Id.* Newell concludes that "Region 6 and [Newell] had an agreement, and Region 6 is estopped from reneging on its agreement." *Id.*

Newell made the same argument in the penalty brief that it filed with the Presiding Officer. *See* Penalty Opp. at 5-6. The Presiding Officer addressed the argument and concluded that:

> [Newell's] assertions are not sufficient to establish that it relied to its detriment on complainant's alleged representations where [Newell] was under an obligation to comply with the PCB disposal rule whether or not complainant pursued an action against it.

Penalty Decision at 10.[25]

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[25] Following Supreme Court precedent, this Board similarly emphasized, in *B.J. Carney*, that a failure to prove detrimental reliance is "fatal" to an estoppel claim against the government:

> Also fatal to [appellant's] estoppel claim is the fact that it has not suffered any detriment from the Region's conduct in this matter. As explained by the Supreme Court, "the party claiming the

Remarkably, on appeal Newell completely ignores the issue of detrimental reliance that the Presiding Officer considered dispositive. In the absence of any argument to the contrary, we conclude -- as did the Presiding Officer -- that compliance with a legal obligation does not constitute a "detriment" and cannot, therefore, support Newell's promissory estoppel claim against Region 6.

Region's Alleged Delay in Filing the Complaint- Newell also contends that Region 6 refrained from taking any action for several years[26] and thereby impermissibly allowed Newell's violations (and the associated penalties) to accumulate. Newell states that "[i]t is a violation of public policy for a regulatory agency to sit back and allow penalties to accrue, instead of taking action." Brief for Appellant at 50. Further, Newell claims that only a "nominal" penalty is warranted here based on the reasoning of a federal district court in a case decided in 1958, *United States v. American Greetings Corp.*, 168 F. Supp. 45 (N.D. Ohio 1958), *aff'd*, 272 F.2d 945 (6th Cir. 1959).

> estoppel must have relied on its adversary's conduct 'in such a manner as to change his position for the worse.'"

B.J. Carney, slip op. at 48 (*quoting Heckler v. Community Health Services*, 467 U.S. at 59).

[26] Before the Presiding Officer, Newell argued that there had been "6 years of inaction" on the part of the Region. Penalty Opp. at 7. On appeal, Newell instead cites "10 years of inaction." Brief for Appellant at 50. Otherwise, Newell's argument to the Presiding Officer is identical to Newell's argument on appeal.

In *American Greetings*, a company subject to a Federal Trade Commission cease and desist order filed a required "Report of Compliance," advising the FTC that it was engaged in a practice of "remounting" competitors' greeting cards on mounts that did not identify the original manufacturer. The FTC did not initially question the practice, and an FTC representative actually "suggested means of improving" the remounting procedure. 168 F. Supp. at 50. Subsequently, however, the FTC enforcement staff characterized the remounting process as a violation of the cease and desist order, and sought penalties for the alleged violation in a judicial enforcement action. The court concluded that the agency was not estopped from characterizing the remounting practice as a violation of its order, but the court also concluded that the agency's initial failure to question the practice was relevant in calculating a penalty for the violation. The court fixed the penalty at $200, reasoning that the Government "might [have led] the defendant to believe that the Government was not objecting" to the practice at issue. *Id.*

Newell's reliance on *American Greetings* is decidedly misplaced. Here, Newell was at all times aware of the improper disposal of PCBs at the HMPC site and the need for their removal and lawful disposal. There is no allegation, and no evidence, that anyone from Region 6 said anything at any time that might have confused the issue. *See, e.g.*, CX 27 (8/19/85 letter from Timothy Johnson to Francis Garrigues concerning the status of the "PCB cleanup"); CX 25 (3/21/86 letter from Mr. Garrigues to Alton Newell, noting that HMPC has had "a pile of contaminated soil in a comer of [its] yard for about one year"). This case is therefore readily distinguished from *American Greetings*.

Similarly, Newell cites no authority for the companion proposition that agency inaction in responding to a violation, which may have the effect of allowing penalties to "accrue" is contrary to "public policy," and that an enforcement action to collect such penalties is automatically barred. The Board rejected that proposition in *B.J. Carney*, pointing out that it had also emphatically been rejected by the courts:

> The Region did not [by an alleged five-year delay] waive any right to bring this enforcement action. "[G]enerally speaking[,] public officers have no power or authority to waive the enforcement of the law on behalf of the public." *United States v. Amoco Oil Co.*, 580 F. Supp. 1042, 1050 (W.D. Mo. 1984). * * * Likewise, in *United States v. Chevron U.S.A., Inc.*, 757 F. Supp. 512 (E.D. Pa. 1990), the court held that "the fact that the EPA did nothing for four years to enforce the regulations against Chevron would not be considered an affirmative misrepresentation and does not satisfy the first requirement of the equitable estoppel defense." *Id.* at 515. "Simply put, the government may not be estopped from enforcing the law, even following an extended period of no enforcement or underenforcement." *Washington Tour Guides Ass'n v. National Park Service*, 808 F. Supp. 877, 882 (D.D.C. 1992).

B.J. Carney, slip op. at 46-47.

Thus, it is clear that Region 6 was not estopped or otherwise barred from instituting this action against Newell based on any alleged delay in doing so. We note in this regard that it seems clear that Region 6 did not affirmatively seek to maximize the accumulation of penalties by either of the respondents. If that had been the Region's intention, the Region would presumably have sought penalties for the entire five-year period preceding the commencement of the action. The Region did not do so; rather, the Region dramatically narrowed the scope of its action, seeking penalties only for a 529-day period starting September 10, 1992 and concluding February 21, 1994. There being no genuine issue of material fact on this point and, finding no legal argument that would justify reversing the Presiding Officer on this issue, we uphold the Presiding Officer's conclusion that Region 6 did not commit misconduct by failing to file this enforcement action earlier than it did.

b. ***"Selective Prosecution"***

Newell asserts that the Region improperly engaged in "selective prosecution" by filing an enforcement action against Newell and HMPC without also filing an action against J.L.B. Invesment Corporation, which owned the HMPC site at one time but which has not otherwise been implicated in the excavation and wrongful disposal of PCB waste at issue here, and against the contractor who moved the contaminated soil at the site into a pile, apparently at Newell Recycling's direction. Brief for Appellant at 45. In attempting to establish such a defense, Newell confronts a "daunting burden." *In re B&R Oil Co.*, RCRA (3008) Appeal No. 97-3, slip op. at 16 (EAB, Nov. 18, 1998), 8 E.A.D. ___. "[C]ourts have traditionally accorded governments a wide berth of

prosecutorial discretion in deciding whether, and against whom, to undertake enforcement actions." *Id.*

To substantiate a claim of selective enforcement or selective prosecution, Newell must therefore establish "(1) [that it has] been singled out while other similarly situated violators were left untouched, and (2) that the government selected [Newell] for prosecution 'invidiously or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights." *United States v. Smithfield Foods, Inc.*, 969 F. Supp. 975, 985 (E.D. Va. 1997) (quoting *United States v. Production Plated Plastics, Inc.*, 742 F. Supp. 956, 962 (W.D. Mich. 1990)). *Accord, Amato v. Securities & Exchange Comm'n,* 18 F.3d 1281, 1285 (5th Cir. 1994) (defendant claiming selective prosecution "must establish that he was singled out for prosecution while others similarly situated were not, and that the action against him was motivated by an arbitrary or unjustifiable consideration, such as race, religion, or the desire to prevent the exercise of a constitutionally-protected right, such as freedom of speech").

It is quite apparent that Newell has not met its burden. Newell has not suggested that the enforcement action against it was motivated by any consideration akin to racial or religious bias or a desire to prevent the exercise of a constitutional right. Newell certainly points to no evidence of such an impermissible motive. Moreover, Newell has failed to proffer any facts that would persuade us that either of the other parties to which it points are, indeed, "similarly situated" in terms of culpability for the violations at issue in this case. Therefore, Newell has raised no genuine issue of material fact with respect to its claim of selective prosecution,

and the Presiding Officer committed no error by rejecting the claim as a basis for penalty mitigation.

c. *Economic Benefit of Noncompliance*

Newell intimates that Region 6 committed misconduct by "refus[ing] to use the BEN model due to the low penalty it would generate." Brief for Appellant at 49. According to Newell, application of this model for calculating the economic benefit of noncompliance would have required Region 6 to lower its penalty proposal to approximately $4,480.00, allegedly the amount of Newell's savings resulting from noncompliance with the PCB disposal regulation. Id.

The Presiding Officer addressed this argument and concluded as follows:

> This argument is flawed in two respects. First, under the Penalty Policy economic benefit is only one element to be considered in calculating a civil penalty. Second, and more significantly, the economic benefit component of the penalty calculation is employed to ensure that a penalty assessment will provide adequate deterrence, and is therefore used only to adjust a penalty upward, not downward.

Penalty Decision at 11.

The Presiding Officer's application of the Penalty Policy is indisputably correct. The relevant portion of the Penalty Policy states:

> In some cases, the [gravity based penalty] may not be sufficient to deter in the face of strong economic incentives to violate. Where a violation involves significant economic benefit, the Agency will assess penalties that remove any benefit, subject to the statutory limitation of $25,000 per day. *This will be in addition to the GBP and any relevant adjustment factors.*

Penalty Policy at 19 (emphasis added). Thus, the role that economic benefit plays in penalty assessment under the Policy is to establish the penalty floor -- the penalty assessment must at least capture the economic benefit of noncompliance, even if other penalty adjustment factors would eliminate a gravity based penalty computation. The Presiding Officer therefore did not err by finding the absence of a genuine issue of material fact relative to this argument and declining to reduce Newell's penalty based on Newell's calculation of the economic benefit associated with its violations.

d. *Voluntary Disclosure*

On appeal, Newell argues that it should have received a 25% penalty reduction for voluntary disclosure of its violations. The PCB Penalty Policy addresses penalty reductions for voluntary disclosure under the heading of "other factors as justice may require." The Penalty Policy states that:

> To be eligible for a penalty reduction for voluntary disclosure, a firm must make the disclosure prior to being notified of a pending inspection. The disclosure cannot be one that

> is required by the PCB regulations or that is made after EPA has received information relating to the alleged violation.

Penalty Policy at 18.

We will not consider Newell's eligibility for a penalty reduction for voluntary disclosure, because Newell failed to request such a reduction in its submissions to the Presiding Officer. The issue was directly addressed in the Region's penalty brief, which stated (citing the Declaration of Jeffrey Jay Robinson) that "[n]o downward adjustment was made for 'voluntary disclosure' because neither Newell nor HMPC voluntarily disclosed the violations." Region's Memorandum in Support of Proposed Civil Penalty at 13 (July 23, 1997). In its response, Newell did not point to any evidence suggesting that it had, in fact, voluntarily disclosed its violations, nor did Newell argue that it should receive a penalty reduction for voluntary disclosure pursuant to the Penalty Policy. The argument has, accordingly, been waived. *See, e.g., In re Britton Construction Co.*, CWA Appeal Nos. 97-5 & 97-8, slip op. at 22-23 (EAB, Mar. 30, 1999), 8 E.A.D. ___ (under 40 C.F.R. § 22.30, appellant "may not appeal issues that were not raised before the presiding officer. As a result, arguments raised for the first time on appeal * * * are deemed waived.") (citations omitted).[27]

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[27] We note that Newell did make reference to the disclosure question in footnote number 5 of its penalty brief below, albeit not in the context of arguing for penalty mitigation. Rather, Newell raised it as part of its argument that it should have been allowed to conduct discovery because it could not obtain evidence of voluntary disclosure except by cross-examining the Region's

e. ***Lack of Environmental Harm***

Newell argues that the "lack of any environmental harm is a mitigating factor" that the Presiding Officer erroneously failed to consider in assessing a penalty against it. Brief for Appellant at 46-47 (citing Penalty Decision at 9).[28] In the very portion of the Penalty Decision cited by Newell, however, the Presiding Officer does in fact consider the issue of environmental harm. Specifically, the Presiding Officer states:

> Harm is given consideration under the [PCB] Penalty Policy only in instances where a violator has taken actions to minimize harm caused by its violation. [Newell] makes no

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own witnesses at an evidentiary hearing or in depositions. This strikes us as a disingenuous proposition. If Newell had indeed made a voluntary disclosure, then, surely, Newell was in the best position to attest to it. Having failed to do so by affidavit in response to the Region's motion for penalty assessment, Newell cannot credibly revive this argument on appeal.

[28] We decline Newell's invitation to consider correspondence generated by its own attorney, along with the absence of a rebuttal by the Presiding Officer, as proof that the Presiding Officer somehow "admitted" the absence of any environmental harm in this case during a telephone conference. *See* Brief for Appellant at 46 (citing RX 24). The Presiding Officer is not a party to this action and is under no obligation to respond to correspondence from the litigants, even if that correspondence seeks to attribute factual "admissions" to the Presiding Officer for later use in an appeal.

> claim, and the facts show no indication, that respondent took any measures to minimize any harm or risk of harm. The mere fact that no harm may have occurred is not a reason to lower the penalty where chance and not respondent's actions are responsible for such an outcome.

Penalty Decision at 9 (citing Penalty Policy at 17).

In addition, environmental harm was addressed through the Presiding Officer's application of the PCB Penalty Policy, since consideration of environmental harm is inherent in the policy's penalty recommendations. The "degree and likelihood of harm from the conduct or activity violating the PCB rules" is incorporated into a penalty, in the first instance, in the calculation of the "extent" of the violation or violations. *See* Penalty Policy at 3. The Presiding Officer thus considered "environmental harm" in that sense by calculating a gravity based penalty predicated on the volume of contaminated soil involved in Newell's violations. Penalty Decision at 4-6. In sum, the Presiding Officer plainly did not "ignore" the issue, as Newell erroneously argues on appeal. Brief for Appellant at 47. The Board finds no error in the Presiding Officer's treatment of this issue.

f. *Cost of Remediation*

Newell contends that the eventual cost of the soil removal -- which Newell claims was $84,000 -- should be considered as a mitigating factor, and that the Presiding Officer committed a "clear abuse of discretion" by failing to consider it as such. Newell points out that, according to the

Penalty Policy, "[p]enalties for * * * disposal violations are based on the approximate cost of cleanup and disposal of the materials contaminated by PCB." Penalty Policy at 5 (quoted in Brief for Appellant, at 47). Newell thus appears to argue that the amount of the penalty assessed in individual cases should be geared to the cost of the cleanup itself.

Newell misapprehends the guidance appearing in the Penalty Policy. The passage quoted by Newell is not an instruction regarding assessments in individual cases; it is rather background information introducing and explaining how the calculations in the Penalty Policy associated with the "extent" factor were developed. As we have seen, the Penalty Policy advocates distinguishing between "major' and"minor" disposal violations quantitatively, classifying the extent of a disposal violation based on the quantity of contaminated material involved in the violation. The passage quoted by Newell simply reflects the correlation which would ordinarily be expected between the cost of cleanup and proper disposal and the amount of contaminated material involved. The amount of the contamination, and remedial costs associated therewith, have been taken into account in developing the Policy's base penalty assessment framework. Indeed, the policy states clearly that "the objective [of the 'extent' framework] is not to estimate actual costs for a specific case, but to provide a sufficient and reasonable basis for calculating penalties that will encourage compliance with the PCB rules." Penalty Policy at 7. Accordingly, we agree with the Presiding Officer that the Penalty Policy should not be read to advocate that, separate and apart from the "extent" calculation, penalties in individual cases correspond to the actual costs of cleanup and proper disposal. Indeed, to conclude otherwise could, by suppressing penalty assessments in cases involving

less-expensive cleanups, serve to undermine the role o.f penalties as an incentive for prompt cleanup. Failure to respond expeditiously to an environmental condition that can be inexpensively addressed is particularly inexcusable and should be subject to penalties sufficient to discourage such behavior. We thus find no error in the Presiding Officer's rejection of Newell's argument for mitigation on this ground. Moreover, we find no genuine issue of material fact with regard to this issue.

g. *Effect of Settlement*

In its penalty brief to the Presiding Officer, Newell argued that it was necessary to deduct the amount received by EPA in its settlement with HMPC from the penalty ultimately assessed against Newell. Penalty Opp. at 6. The Presiding Officer did so. In his Penalty Decision, he directed that Region 6 "should notify respondent Newell immediately of the amount of respondent [HMPC's] settlement and that amount shall be deducted from the penalty assessed against respondent Newell." Penalty Decision at 13. The Presiding Officer further ordered, however, that no other consideration would be given the settlement amount, in recognition of the requirements of 40 C.F.R. § 22.22(a). That provision of the Consolidated Rules states, in relevant part, that "evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence is not admissible." Thus, the Presiding Officer explained, "[s]ettlement offers or terms are not indicative of, and should not be used as evidence of, the amount of the appropriate penalty in a proceeding to determine a penalty." Penalty Decision at 12 (citing *McInnis v. A.M.F.. Inc.*, 765 F.2d 240, 247-48 (1st Cir. 1985); *McHann v. Firestone Tire & Rubber*

Co., 713 F.2d 161, 165-66 (5th Cir. 1983); *Quad/Graphics Inc. v. Fass,* 724 F.2d 1230, 1235 (7th Cir. 1983); *United States v. Contra Costa County Water District,* 678 F.2d 90, 92 (9th Cir. 1982)).[29]

In its appellate brief, Newell does not challenge the Presiding Officer's ruling with respect to the effect of 40 C.F.R. § 22.22(a). Nonetheless, seemingly with complete disregard for that ruling, Newell cites the settlement amount in its appellate brief and argues that the Presiding Officer committed an abuse of discretion by failing to consider the settlement amount "in his assessment of the fairness and propriety of his penalty award" against Newell. Brief for Appellant at 49. In response, Region 6 has filed a motion, based on 40 C.F.R. § 22.22(a), to strike all references to the settlement amount from the record of the proceedings before the Board. Newell opposes the motion to strike, and addresses the Rule 408 issue only in that context.

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[29] Each of these cases involves the admissibility of a settlement between a plaintiff and a third person -- a joint tortfeasor or former defendant -- when offered into evidence by the remaining defendant or defendants. The cases are therefore procedurally indistinguishable from the present case, involving a settlement between the complainant and one of two co-respondents being offered into evidence by the second co-respondent. Rule 408 is fully applicable to settlements of this nature. *See, e.g., McHann,* 713 F.2d at 166 ("Under Rule 408, 'a defendant cannot prove the invalidity or amount of a plaintiff's claim by proof of plaintiff's settlement with a third person * * *.'") (quoting 2 D. Louisell & C. Mueller, *Federal Evidence* § 171, at 290 (1978 & Supp. 1983)).

Both the Region's motion to strike and Newell's claim of error based on the Presiding Officer's failure to consider the settlement amount turn on the admissibility of the settlement evidence; obviously, if the settlement amount was not admissible the Presiding Officer cannot have erred by failing to consider it. We therefore turn to the evidentiary issue and to Rule 408 of the Federal Rules of Evidence, which states in part:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, *is not admissible to prove liability for or invalidity of the claim or its amount*. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

Fed. R. Evid. 408 (emphasis added).

In its Opposition to the Region's Motion to Strike, Newell makes three assertions: (1) "It is EPA policy to consider other penalties when calculating what is a fair, uniform and consistent penalty"; (2) "Rule 408 applies to liability issues and *not* to penalty considerations"; and (3) "Rule 408 *does not* apply in civil penalty cases." Opposition to Motion to Strike at 6 (emphasis in original).

Newell's first and third assertions are negated by the very existence of 40 C.F.R. § 22.22(a). Whether or not Rule 408 applies in civil penalty cases generally, section 22.22(a)

dictates that it applies in EPA administrative civil penalty actions that are governed by part 22. And the general policy noted by Newell -- which does not, in any event, imply any requirement to examine settlements when calculating penalties in litigated cases[30] -- is necessarily trumped to the extent that a specific regulation such as section 22.22(a) precludes a presiding officer's receipt of particular evidentiary material in calculating a penalty.

Newell's assertion that Rule 408 applies only to liability rulings is also incorrect. The rule expressly bars the use of settlement evidence to prove the "amount" of a claim. *United States v. Contra Costa County Water District* illustrates the principle. Them, the United States filed two separate actions to recover the cost of repairs to a retaining wall. The first action, against an adjoining landowner whose conduct had imperiled the wall, was settled, nominally, for $75,000 -- but only $30,000 was actually paid to the United States. In the second action, against a user of the wall contractually obligated to pay for maintenance, the United States sought to recover the balance of its repair cost after

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[30] We note that in its Opposition to the Motion to Strike, Newell acknowledges that it "makes sense" to conclude that "negotiated settlements with the agency cannot be compared to penalties imposed by an administrative law judge after hearing." Opposition to Motion to Strike at 4 (citing *In re Briggs & Stratton Corp.*, 1 E.A.D. 653 (JO 1981)). We agree. As the Judicial Officer remarked in *Briggs & Stratton*, it "seems obvious" that comparisons between payments made in settled cases and penalties assessed in litigated cases cannot establish "that the penalties assessed * * * are inconsistent with EPA's policy favoring uniform penalties for like violations." 1 E.A.D. at 666.

deducting the $30,000 received in the first action. The defendant believed itself entitled to a credit in the full amount of the prior settlement ($75,000) and urged the district court, for that reason, to take judicial notice of the settlement. Relying on Rule 408, however, the Ninth Circuit upheld the district court's refusal to admit the settlement into evidence. 678 F.2d at 92.

Accordingly, we conclude that the Presiding Officer did not err by declining to consider the settlement involving HMPC as a basis for penalty mitigation in favor of Newell. We further conclude that the Region's motion to strike all references to the amount of the HMPC settlement from the record of these proceedings is well founded, and the motion is therefore granted.

h. *Penalties in Other Cases*

Finally, Newell offers a comparison of its own case with other TSCA administrative penalty cases that have, for various reasons, come before the Board and/or its predecessors. Newell claims that the penalties ultimately imposed in those other cases were much lower than the penalty being assessed against Newell, but that its own conduct is far less aggravated than the conduct described in those other cases. We note that the outcomes in these other cases are not in dispute -- only their significance to the question at hand. Newell concludes that the Presiding Officer abused his discretion by failing to address the other cases cited by Newell when calculating a penalty in this case. Brief for Appellant at 41.

Newell's characterization notwithstanding, the Presiding Officer did not treat the evidentiary significance of other TSCA cases as a matter of discretion. He noted, rather, that existing EPA administrative case law specifically addresses the effect of evidence concerning penalties in other cases:

> As complainant correctly notes, penalties assessed in other cases have no bearing on the penalty assessment in this case. As the [Chief Judicial Officer] has stated, quoting the Supreme Court, "The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions in other cases."

Penalty Decision at 11 (quoting In re *Chautauqua Hardware Corp., 3* E.A.D. 616, 627 n. 14 (CJO 1991); *Butz v. Glover Livestock Commission* Co., 411 U.S. 182, 187 (1973)). *See also In re Spang &* Co., 6 E.A.D. 226, 242 (EAB 1995) (where we held, quoting Koch, 1 *Administrative Law and Practice* § 5.20 at 361 (1985), that "'generally speaking, unequal treatment is not an available basis for challenging agency law enforcement proceedings'"). *Cf. In re SchoolCrafi Construction, Inc.,* CAA Appeal No. 98-3, slip op. at 24 (EAB, July 7, 1999), 8 E.A.D. __ (penalty assessed against one respondent held not erroneous despite lower penalty assessed against a second respondent).

We continue to hold to the principle that penalty assessments are sufficiently fact- and circumstance-dependent that the resolution of one case cannot determine the fate of

another. Accordingly, the Board upholds the Presiding Officer's decision not to adjust the penalty in this case based on penalties assessed in other cases.

For all of the foregoing reasons, the Board concludes that Newell did not raise any genuine issue of material fact with respect to the appropriateness of the penalty proposed to be assessed against it. The Presiding Officer did not err or abuse his discretion by assessing a penalty against Newell by means of an accelerated decision.

5. *Penalty Amount*

As the preceding discussion indicates, the Presiding Officer did not err in determining that the proposed $1.345 million civil penalty was an appropriate one. The preceding discussion further makes clear that Newell has not established any valid grounds for mitigation of the penalty. The Board finds no other reason to disturb the Presiding Officer's recommended civil penalty assessment; that assessment is, accordingly, upheld.[31]

---

[31] We note in this regard that the Region's decision to establish February 21,1994, as its penalty cut-off date, rather than the date that the waste pile was ultimately removed and properly disposed of (September, 1995), served to reduce dramatically the amount of the penalty to which Newell would have otherwise been subject. Viewed in this light, Newell's penalty has, in effect, been substantially mitigated in the original framing of the case.

III. *CONCLUSION*

The Initial Decision is affirmed with respect to Newell's liability, and Newell is assessed a civil penalty of $1,345,000 (less the amount paid by Oklahoma Metal Processing Company, Inc. d/b/a Houston Metal Processing Company pursuant to its settlement in this matter). Payment of the full amount of the penalty assessed shall be made by forwarding a cashier's or certified check, payable to the Treasurer of the United States, to the following address within sixty (60) days of the date of receipt of this decision:

EPA - Region VI
Regional Hearing Clerk
P.O. Box 360582
Pittsburgh, PA 15251-6582

So ordered.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed January 9, 2001]

No. 99-60694

NEWELL RECYCLING COMPANY INC	)
Petitioner	)
v.	)
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY	)
Respondent	)
MATTHEW J NASUTI; AMERICAN PUBLIC	)
Not Party	)

Petition for Review of an Order of the Environmental Protection Agency

ON PETITION FOR REHEARING EN BANC

(Opinion 11/8/00, 5 Cir., _____, _____, F.3d_____)

Before DUHÉ, EMILIO M. GARZA, and DeMOSS, Circuit Judges.

PER CURIAM:

(√) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED.R.APP.P. and 5TH CIR.R.35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED.R.APP.P. and 5TH CIR.R.35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/_____
United States Circuit Judge

APPENDIX D

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

[Filed February 3, 1997]

TSCA DOCKET NO. VI-659C

IN THE MATTER OF:	)
	)
OKLAHOMA METAL PROCESSING COMPANY, INC. d/b/a HOUSTON METAL PROCESSING COMPANY	)
	)
and	)
	)
NEWELL RECYCLING COMPANY, INC.	)
RESPONDENTS	)
	)

MEMORANDUM IN SUPPORT OF COMPLAINANT'S RESPONSE OPPOSING MOTION FOR DISCOVERY BY RESPONDENT NEWELL RECYCLING COMPANY, INC. AND RESPONSE TO HOUSTON METAL PROCESSING COMPANY'S MOTION TO ADOPT NEWELL RECYCLING COMPANY'S MOTION FOR DISCOVERY

Counsel for Complainant hereby files this Memorandum in support of its response opposing discovery requested by Newell Recycling Company, Inc. Because HMPC has filed in this proceeding a motion to adopt Newell's discovery motion, Complainant also opposes HMPC's motion and respectfully requests the Presiding Officer to deny each motion for the reasons stated below.

I. Discovery under the Part 22 Consolidated Rules

The Consolidated Rules promulgated in 40 C.F.R. Part 22 specifically provide for discovery in EPA administrative enforcement actions through the exchange of witness lists (with a brief narrative summary of their expected testimony) and exhibits and documents pursuant to 40 C.F.R. § 22.19(b). Beyond this exchange, the parties are not obligated to complete any other discovery. In the Matter of Hawaiian Independent Refinery, Inc., RCRA-09-91-0007, 1192 RCRA LEXIS 302, at 3 (July 14, 1992). Further discovery, beyond the § 22.19(b) exchange, shall be permitted only upon determination by the Presiding Officer:

(i) That such discovery will not in any way unreasonably delay the proceeding;

(ii) That the information to be obtained is not otherwise obtainable; and

(iii) That such information has significant probative value. The extent to which discovery is granted, if at all, is determined by these factors. In re Rockwell International Corp., TSCA-PCB-VIII-86-028 (January 28, 1988 at 3). As argued below, the discovery sought by Newell does not meet

all three requirements for further discovery. Complainant addresses each of Newell's discovery requests below. A copy of Newell's discovery requests is included as Exhibit 4 to this memorandum.

II. The Discovery sought by Newell has no significant probative and is otherwise obtainable and, therefore, should be denied.

A. Proposed Request for Production 1; Proposed Interrogatories 2 and 3.

RCRA and CERCLA files are irrelevant to this proceeding. Such records have no significant probative value with respect to Newell's culpability or the appropriateness of a civil penalty under TSCA. Newell does not provide even a minimal justification for seeking discovery of RCRA and CERCLA files or how such documents or list of persons have any significant probative value. Therefore, the request for RCRA and CERCLA records should be denied.

The requested TSCA (as well as any RCRA and CERCLA) files, and dates of inspection, are available to Newell under the Freedom of Information Act (FOIA). Newell has had ample opportunity to make such a FOIA request to Complainant, but has not done so. Newell will be in no way prejudiced or denied due process by submitting a FOIA request for this information. Therefore, the discovery sought is otherwise obtainable by Newell and discovery should be denied.

B. Proposed Requests for Production 2 and 3; Proposed Interrogatories 1 and 10.

These discovery requests have no significant probative value with respect to Newell's culpability or to the appropriateness of a civil penalty in this proceeding. Similar discovery requests were denied in In the Matter of: Chautauqua Hardware Corporation, EPCRA Appeal No. 91-1, Order on Interlocutory Review, (June 24, 1991) (Chautauqua). In Chautauqua, the respondent filed a motion with the Administrative Law Judge requesting discovery through interrogatories to EPA on, among other things, the following issues: "how EPA first became aware of Chautauqua's non-compliance with the EPCRA reporting requirements; [] when EPA first became aware of Chautauqua's noncompliance with EPCRA's reporting requirements; [and] why EPA waited until August 22, 1989 to conduct a Section 313 compliance inspection at Chautauqua's facility. . ." Chautauqua at 24. EPA's Chief Judicial Officer vacated the Presiding Officer's order for complainant to comply with the discovery requests. Id. The Chief Judicial Officer ruled that when and whether EPA was aware of Respondent's non-compliance and the timing of EPA's inspection . . .

Excerpted Memo. in Support & EPA Correspondence

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

April 11, 1997

Matthew J. Nasuti, Esq.
McQuaid, Metzler, McCormick & Van Zandt
One Maritime Plaza
23rd Floor
San Francisco, California 94111-3577

Re: Freedom of Information Act Request
No. (6)RIN-97-00478

Dear Mr. Nasuti:

This is in response to your Freedom of Information Act request which has been numbered (6)RIN-97-00478. Enclosed are copies of responsive documents from files of the Compliance Assurance and Enforcement Division, complying with your request for documents regarding the Fidelity Road, Houston Site which is the focus of EPA administrative action, TSCA Docket No. VI-659C. With the exceptions identified below, enclosed are all the documents subject to your request that you have not already received in the above-referenced enforcement action, and which were not generated in 1996 or 1997.

I initially deny your request for the following documents: Handwritten Notes, Internal "Review of HMPC Answer," no date, 2 pages; personal notes of EPA Engineer Jim Gold, October 19, 1989 - November 2, 1989, 4 pages;

Memorandum from Carol D. Peters, Chief, Toxics Section, to Richard P. Gigger, Jr., Chief, Compliance Monitoring Section, January 29, 1991, 1 page; Attorney work notes, June 14, 1995, 3 pages; Internal EPA "Fact Sheet," undated, 2 pages; Internal Agency communication between EPA Region 6 and EPA Headquarters, March 15 to April 11, 1995, 5 pages [including 3 page Fax transmittal sheets]; Routing and Transmittal Slip Notes from Carol to Jeff, undated, 1 page; Penalty calculation analysis, undated, 3 pages; Memorandum from Juan Rodriguez to [EPA Attorney] Pat Spillman, March 10, 1995, 2 pages; Message from Pat Spillman to [EPA Scientist] Jeffrey Robinson, February 8, 1995, 1 page; wo draft TSCA subpoenas with handwritten changes, undated, 24 pages; Message from Pat Spillman to Jeffrey Robinson, November 4, 1994, 1 page; Message from Jeffrey Robinson to Pat Spillman, November 4, 1994, 1 page; Message from Jeffrey Robinson to Pat Spillman, October 31, 1994, 1 page; Memorandum from Robert V. Murphy,Chief, Pesticides and Toxics Branch to ten [EPA Region 6] addressees; August 18, 1994, 1 page; Message from Jeffrey Robinson to Guy Tidmore, August 8, 1994, 2 pages; Attorney work notes, June 24, 1994, 1 page; Attorney work notes, December 8, 1993, 2 pages; Memorandum from Carol D. Peters to [EPA Attorney] Pamela Phillips, November 23, 1993, 1 page; "Compliance Evaluation" summary by Jeffrey Robinson, November 19, 1993, 4 pages; Record of Communication from Guy Tidmore to Jeff Robinson, November 12, 1993, 1 page; Message from Jeff J. Robinson to Eddie Sierra, November 2, 1993, 1 page; Master FTTS [EPA case tracking] Data Form, undated circa 1993, 1 page; Message from Jeff J. Robinson to E. Washington [RCRA Enforcement Branch], September 14 and October 18, 1993, 2 pages; Internal EPA "PCB Reviewers Summary" by [EPA Scientist] Jim Yang, July 16,

1993, 2 pages; Internal EPA "PCB Reviewers Summary" personal notes of Jeff Robinson, October 29, 1990, 2 pages. These documents are exempt from disclosure under 5 U.S.C. § 552(b)(5) & (7).

You may appeal this partial denial of your request within thirty (30) days of receipt of this letter by writing to the Freedom of Information Officer, (1105), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460. Your appeal letter should refer to the date of this letter and should state whether any records to which access was denied, are not a subject of the appeal.

If you have any questions regarding this response, please contact Lou Roberts at (214) 665-7579. You should refer to the RIN number above in any further correspondence concerning this matter.

You will be sent in a separate mailing an itemized invoice covering only the charges for search and review time and copy costs for the enclosed, in accordance with 40 C.F.R. § 2.120.

Sincerely yours,

/s/_____
Lynda F. Carroll
Acting Assistant Regional
Administrator for Management

Enclosures

McQUAID, METZLER, McCORMICK & VAN ZANDT

May 2, 1997

Freedom of Information Officer (1105)
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Subject: Freedom of Information Act Appeal
Rin-97-00478

Gentlemen:

We herein appeal the April 11, 1997 decision of EPA Region 6 to withhold documents requested by us pursuant to the Freedom of Information Act (5 U.S.C. §552 et seq.). This request covers all withheld documents except those to and from, and/or prepared by EPA attorneys Pamela Phillips and Pat Spillman.

We are currenfiy in litigation with EPA in this matter and the requested documents are needed for our defense. EPA attorney Pat Spillman has informed our judge that such documents would be provided if we utilized a FOIA request.

Sincerely,

/s/_____
MATTHEW J. NASUTI

APPENDIX E

LETTER TO MR. JAMES GOLD, EPA, FROM WAYNE R. MATHIS, ESQ.

November 21, 1989

Mr. James Gold
Environmental Protection Agency
6608 Hornwood
Houston, Texas 77074

RE: Houston Metal Processing Company
Our File No. 979-M01

Dear Mr. Gold:

Pursuant to your request, I enclosed herewith the report prepared by Raba-Kistner Consultants, Inc. in January of 1985 which was filed with the Texas Department of Health in Austin. Subsequent to this report, other reports have been obtained to analyze the potential of on-site contamination. As these reports are subject to the attorney-client privilege as pertains to the owner of the property, Oklahoma Metal Processing Company, Inc., d/b/a Houston Metal Processing Company ("HMP"), as well as my client, Newell Recycling Co., Inc. ("NRC"), I will need their approval to release the information. HMP is not my client, but the information obtained was in conjunction with their counsel.

I have scheduled a meeting with HMP during the week of December 4, 1989. Subsequent to that meeting, I will be in a substantially better position to advise you as to the responses to be forthcoming from my client, NRC. I anticipate that a joint meeting between you, myself, and counsel for HMP will be necessary the first or secod week in December in an effort to determine likely courses of action with regard to this site.

Yours very truly,

BROCK & MATHIS, P.C.

By: /s/_____
Wayne R. Mathis

cc: Eric N. Green, Esq.
Mark A. Huvard, Esq.

APPENDIX F

TELEPHONE CONVERSATION RECORD OF LOCKWOOD, ANDREWS & NEWNAM, INC.

Project Name HMP - SITE CLEAN UP
Client NEWELL RECYCLING
Date 10/20/87 Time 4:00
Call from WAYNE MATHIS with BROCK & KEFLER
Call to D KEYES with LAN

Discussion

Wayne called to update me on his meeting with Ms. Greenfield of the USEPA.

In general Wayne said the EPA is not overly concerned with sites containing less than 10,000 ppm PCB's. A key point is the date of the spill. Wayne can not proof [sic] whether or not the spill occured [sic] before 1978. The EPA seems willing to ecept [sic] the fact that contamination did occur prior to 1978 and therefore TSCA is not involved. This willingness is also due to the fact that the EPA seems willing to allow a 50 ppm clean up level and assumes the state will also. Clean up however will be negotiated with the state. EPA thought landfills in the state would accept the 50-500 ppm material.

Wayne also said it appears Newell is not liable rather HMP as the present owners are liable. He wants to get them involved in the decisions and payment. Also any legal action will not be between Newell and EPA but between Newell and HMP. Wayne did confirm that the site was used by the Corp of

Engineers as a dredge dump site and that the EPA would therefore not be concerned with some heavy metal contamination.

I left is [sic] with Wayne that the investigation still must be completed before we can make a clean up proposal to the state.

APPENDIX G

BUREAU OF SOLID WASTE MANAGEMENT
TEXAS DEPARTMENT OF HEALTH
TELEPHONE/VISIT MEMO TO THE FILE

DATE: May 3, 1985
(P/PA#): 71068

File Subject (name): Newell Industries - Houston Metal Processors

Solid Waste Representative: Robert H. Ray P.E., Leonard Mohrmann

Called by: ☐
Called: ☐
Met with: ☒ (name) Carl Williams (Phone#) _____
(title) Consulting Engineer
(organization) Raba-Kistner

Subject of meeting: PCB spill & proposed clean up.

Mr. Jack Carmichael, Bureau Chief was informed of the below info on May 3, 1985

Print - Typing not necessary

Comments:

On May 2, 1985 Ms. Ann McGinley, TDWR, Solid Waste & Spill Response called Cliff Hall to inform us that a meeting was scheduled at 1:30 PM on May 3, 1985 with Mr. Williams & Representatives of Newell Industries.

Persons present at meeting in TDWR Office, May 3, 1985

Ann McGinley - TDWR
Robert H. Ray - TDH
Leonard Mohrmann - TDH
Carl Williams, P.E. - Raba-Kistner
Jeff Harris, P.E. - Raba-Kistner
Buck Nichols - Newell Enterprises - in charge of on site lead clean up
Tim Johnson - Newell Enterprises (Attorney)

During week of April 22 - 26 during clean up for lead contaminated soil under TDH approved clean up plan, several transformers were discovered. The soil clean up of lead was stopped immediately by Mr. Buck Nichols who is in charge of on site lead clean up. Mr. Nichols directed that sampling take place. Mr. Harris directed sampling investigation and results of oil in Transformers was 432,000 ppm PCB's soil samples (see attached map) were taken at several points on the site.

The results of these soil samples ran from non-dectable [sic] to 193 ppm PCB's in the soil.

The transformers are thought to have come from Houston Power & Light Company to an Employee of Newell in about

1980. Mr. Johnson and Nichols are investigating this aspect of the problem.

Surface clean up of lead contaminated soil has resulted in 14 truck loads of soil being shipped to TECO in Robstown. This is from adjacent property and property tested which showed no PCB contamination. The Transformers were apparently burried [sic] on site. The exact number is not presently known.

Mr. Williams proposed that Raba-Kistner & Newell Ent. determine the number of transformers, the location(s) and extent of contamination. Also to send TDH a proposed clean up plan of the PCB problem. This was verbally agreed to by Robert H. Ray & Leonard Mohrmann of TDH. Raba-Kistner will investigate sites for disposal of PCB's and PCB contaminated soil.

Mr. Johnson stated that Newell Enterprises would probably attempt to determine where the tranformers came from and who was responsible. They might also take some action to recover costs of clean up and disposal in the future from a third party. Newell will proceed with the disposal and clean up of both the PCB's and the remainder of the lead contaminated soil.

Mr. Mohrmann contacted Darl Mount - EPA Dallas & informed him of the above. Mr. Mount said to keep him informed. EPA may take action in future.

/s/_____
(Robert H. Ray)

APPENDIX H

LETTER TO WAYNE MATTHIS, ESQ. FROM L.B. GRIFFIN, JR., P.E., DIRECTOR OF SURVEILLANCE AND ENFORCEMENT DIVISION, BUREAU OF SOLID WASTE MANAGEMENT

February 6, 1985

Mr. Wayne Mathis
Newell Enterprises
P.O. Box 9132
San Antonio, Texas 78204

Subject: Hazardous Waste - Harris County -
TDH Reg. No. 71068
Newell Industry/Houston Metal Processing Company - EPA I.D. NO. TXD040333783
Hazardous Waste Cleanup

Dear Mr. Mathis:

On January 16, 1985, Mr. Jeff M. Harris, P.E., of Raba-Kistner Consultants, Inc., submitted a plan to this office for the cleanup of the Newell Industry/Houston Metal Processing Company facility at 5225 Fidelity, Houston, Texas.

The plan requires that all soil containing 5.0 mg/L lead or more, as determined by the EP Toxicity Procedure, be removed from the site and disposed of in a hazardous waste landfill. It is suggested that all soil be removed having a level

of total lead of 500 PPM or greater, but is required that all soils be removed having 1000 PPM. In Table 1 under "Condition" this should read "EPT less than 2.5 and Total Pb less than 1000 PPM".

The plan is approved if the two minor changes above are included. Mr. Harris was given conformation of this approval by telephone on January 21, 1985.

If you have any questions concerning this letter or if we may be of any assistance to you regarding solid waste management, you may contact Mr. Robert H. Ray, P.E., here in Austin at telephone number (512) 458-7271 or you may prefer to contact Mr. Mark V. Lowry, P.E., Regional Director of Environmental and Consumer Health Protection at 1110 Avenue G, Rosenberg, Texas 77471; telephone number (713) 342-8685.

Sincerely yours,

/s/_____
L.B. Griffith, Jr., P.E., Director
Surveillance and Enforcement Division
Bureau of Solid Waste Management

cc: Region 11, TDH
Mr. Francis Garriques
Houston Metal Processing Company
Mr. Jeff M. Harris, P.E.
Raba-Kistner Consultants, Inc.
Harris County Health Department
Harris County Pollution Control Department
Houston City Health Department